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Saint Alphonsus Diversified Care v. MRI Associates Appellant's Reply Brief Dckt. 40012

IN THE SUPREME COURT OF THE STATE OF IDAHO

SAINT ALPHONSUS DIVERSIFIED CARE, INC., an Idaho nonprofit corporation, *Plaintiff–Appellant,* v. MRI ASSOCIATES, LLP, an Idaho limited liability partnership, *Defendant–Respondent.*	)	
MRI ASSOCIATES, LLP, an Idaho limited liability partnership; MRI LIMITED, an Idaho limited partnership; MRI MOBILE LIMITED, an Idaho limited partnership, *CounterClaimants–Respondents,* v. SAINT ALPHONSUS DIVERSIFIED CARE, INC., an Idaho nonprofit corporation; SAINT ALPHONSUS REGIONAL MEDICAL CENTER, INC., *CounterDefendants–Appellants.*	)	Supreme Court Docket No. 40012-2012

APPELLANTS' REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County
Honorable Michael Wetherell, District Judge, Presiding

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INTRODUCTION

In its opening brief, Saint Alphonsus showed that MRIA failed to prove that any amount of lost profits or lost value damages was caused by Hospital misconduct, rather than by legal competition by IMI. The Hospital also showed that it was denied a fair trial by a number of legal and evidentiary rulings. Among these errors were an instruction that allowed the jury to find a breach of fiduciary duty if the Hospital's lawful dissociation were shown to be "improperly" financially motivated, and the admission of evidence found relevant because it supported that conclusion. Another highly prejudicial error was the court's denial of a directed verdict on MRIA's oft-repeated claim that Saint Alphonsus refused to enforce a purported contractual duty of the radiologists to provide 24/7 coverage to MRIA's outpatients, when the unambiguous terms of the contract created no such right or duty. In these and other instances, the court abused its discretion by allowing MRIA to introduce inflammatory and improper evidence and argument. At the same time, in at least six respects, the court also erred by preventing the Hospital from offering proper evidence and argument to defend itself.

MRIA's opposition brief spins a blockbuster saga of premeditated disloyalty and corporate wrongdoing by Saint Alphonsus, suggesting falsely that the jury's general verdict confirms its acceptance of the specifics of MRIA's tall tale. Respondents' Brief ("MRIA Br.") 1-3, 6-13, 18-20. But that jury argument and accompanying plea that any reversal would "usurp the role of the jury," MRIA Br. 3; *see also id.* at 22, 39, are not responsive to the issues on appeal. Saint Alphonsus will not, in this Court which reviews for legal error, be diverted from focusing on those issues to engage in a general discussion of the facts.

It is highly relevant, however, that in responding to the Hospital's legal contentions before this Court, MRIA has relied upon several wholly unsupported and egregiously incorrect factual assertions. For example, and most strikingly, because MRIA completely failed to account for Center's losses to legitimate competition by IMI, MRIA now asserts a position, not advanced at trial and against all evidence, that the Hospital "created" IMI, and thus is responsible for everything it did. MRIA Br. 17, 18, 22, 43. MRIA simply rewrites the facts in hopes of rendering irrelevant the unsatisfied requirements of *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982). *See infra* pp. 9-12.

Likewise, to defend its construction of the radiology services agreement as obligating the GSR radiologists to provide 24/7 coverage for MRIA's outpatients, MRIA falsely asserts that Hospital witnesses testified at the first trial in accordance with MRIA's construction of the contract. MRIA Br. 63, 67; *see also infra* pp. 39-40 & nn. 21 & 25. Further, to make that construction appear more plausible, MRIA incorrectly states that former Hospital CEO Chris Anton testified that Center was "one and the same as St. Al's radiology department," MRIA Br. 5, 67; *see also infra* n. 23, and mistakenly asserts that Saint Alphonsus owned Center, MRIA Br. 68; *see also infra* n. 20.

MRIA also misstates the record to support the improbable allegation of its principal witness, Dr. Prochaska, that Hospital CEO Sandra Bruce "took over" MRIA's negotiations with GSR when they were on the verge of success in June 1999, and, over a period of six months, used that role to torpedo the negotiations while MRIA "just waited for whatever information came [its] way." Tr., Vol. 3, p. 263:12-13; *see also* MRIA Br. 6. MRIA now claims that Bruce

herself "admits that she was asked to step in to finish up the MRIA-GSR deal." Cross-Appellants' Brief ("MRIA Cross-Appeal Br.") 27. But, in fact, Bruce expressly denied being asked or agreeing to take over MRIA's negotiations with GSR. And two other witnesses with direct involvement denied any awareness that Bruce or any Hospital representative ever took charge of the negotiations on behalf of MRIA. *See infra* p. 28 & n. 15.

MRIA also violates an order of limited admissibility when it advises this Court that Saint Alphonsus "confirmed internally that the cheapest option for it was to wait for MRIA to lose … business [before] either buy[ing] it … or … dissociat[ing]." MRIA Br. 12. This assertion rests on a hearsay statement about a comment supposedly made by Hospital COO Schamp. MRIA was allowed, erroneously the Hospital submits, to introduce the evidence for a limited impeachment purpose, but expressly not for the purpose of showing that the referenced statement was made. MRIA now uses this evidence in argument to this Court in a manner directly foreclosed by the trial court's ruling. *See infra* pp. 48-49 & nn. 28-29.

As these and other examples discussed below demonstrate, MRIA repeatedly exaggerates, distorts, and misstates the record in an effort to malign the Hospital in order to deflect its legal arguments. In doing so, MRIA offers no substantial responses to the legal errors and shortcomings in MRIA's proof actually at issue. The judgment should be reversed.

ARGUMENT

I. MRIA FAILED TO PROVE DAMAGES OR A RIGHT TO DISGORGEMENT

A. MRIA Failed To Prove Center's Lost Profits

The award of Center's lost-scan profits must be set aside because it is based on the unsupported "assumption" of MRIA's experts that Saint Alphonsus's alleged misconduct in assisting IMI caused *every* referral of a patient to IMI by *every* doctor who had previously made any referrals to Center or who was affiliated only with Saint Alphonsus. *See* SA Br. 20-23.

This assumption embodies two distinct unproven premises—first, that these referrals would in fact have gone to MRI Center if they had not gone to IMI, and second, that all of them went to IMI because of wrongdoing by Saint Alphonsus, rather than legitimate competition by IMI. Contrary to MRIA's assertion, the problem is not that "[Saint Alphonsus] was able to procure some contradictory evidence." MRIA Br. 13-14. It is rather the lack of substantial and competent evidence, insofar as (1) MRIA's expert conceded that an indeterminate portion of these "lost" scans would not have gone to Center had they not gone to IMI, and (2) MRIA failed to offer *any* evidence that Hospital misconduct legally caused all—or any particular portion—of the claimed scan migration. MRIA's responsive brief does not address these deficiencies of proof because it cannot. Instead, MRIA responds by changing the subject and misstating the case it presented at trial.

1. MRIA Failed To Prove The Amount Of Scan Migration From Center To IMI

In opining that *all* scans referred to IMI by *all* physicians who had ever previously referred even a single patient to Center were "lost" by MRI Center, Budge conceded that his

damages model over-estimated the volume of such lost scans by an amount that he could not determine. Tr., Vol. 21, pp. 4595:1-4601:14; p. 4639:10-25; SA Br. 24-25. In fact, the evidence amply showed that a small number of past referrals to a single center does not suggest that most or all future referrals will go there as well. *See* Trial Ex. 4566 (showing dozens of physicians referring multiple scans to both Center and IMI through 2005). As Budge conceded, the extent of his method's overinclusiveness is indeterminate. Therefore, it cannot be compensated for by MRIA's speculation, MRIA Br. 28-29, that some unknown number of scans not claimed as "lost" might properly have been included if Budge had actually analyzed them. SA Br. 25-26.[1]

MRIA gives only very limited attention to this distinct issue of how many IMI scans migrated from Center to IMI, *see* MRIA Br. 32-33 & nn.24-25, even though it is the exact universe of scans for which lost profits were claimed and awarded. Instead, MRIA generally speaks in terms of the sufficiency of its damages proof as a whole, MRIA Br. 13-35, and seeks to hide behind the correct but irrelevant observations that it need not prove each individual instance of scan migration and that "some imprecision" is permissible in damages analysis, MRIA Br. 31-32. While it is legally sufficient to "make a just and reasonable estimate of the damage based on relevant data," *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 233-34, 646 P.2d 988, 1004-05 (1982), Budge's utter guesswork is not such an estimate and will not suffice.

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[1] The parties dispute whether or not the record shows that Budge's overstatement was vast, *compare* SA Br. 24-25 *with* MRIA Br. 33 n.25, but the critical point is Budge's concession that he did not know how to quantify the overstatement, even by approximation, and had not tried to do so. Tr., Vol. 21, p. 4639:22-25. So MRIA's best case is that its expert made an admitted overstatement of indeterminate size. That is insufficient to sustain the verdict.

Further, such unsupported guesswork is not rendered sustainable simply because Budge testified that he was "highly confident" that his numbers on "the amount of [scan] migration" are "evenhanded and generally reliable." MRIA Br. 32. "A witness who invokes 'my expertise' rather than analytic strategies widely used by specialists is not an expert as Rule 702 defines that term.... An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Zenith Elecs. Corp. v. WHTV Broad.*, 395 F.3d 416, 419 (7th Cir. 2005) (internal quotation marks omitted). Budge needed to explain *why* his estimate was reliable, and he did not, because it is not.

MRIA also leans on a demonstrative exhibit purportedly showing that "IMI [was] gaining scans at approximately the same rate that Center [was] losing them." MRIA Br. 32-33. But MRIA claimed that "only 51% of IMI scans" would otherwise have gone to Center, MRIA Br. 33 n.24, and offered no evidence reflecting the changing marketplace or the relative performance of other competitors at the time, as would be necessary to draw any sort of inferences from this graph. The gross appearance of a single graph thus adds nothing to Budge's flawed methodology, and leaves one with no reason to think that the correct percentage is 51%, rather than 30%, or 20%, or some other number.

MRIA also blames Saint Alphonsus for the failure of proof of diverted scans because the Hospital "did not present any evidence of the degree of imprecision" of the evidence presented. MRIA Br. 33. But, since MRIA had the burden of proof, it had an obligation to present a reasonable methodology and admissible evidence from which a reasonable estimate of damages could be inferred. It was not the Hospital's burden to provide "direction on what MRIA should

have done to prove the amount of damages," MRIA Br. 35, or to provide an estimate of the volume of scans that Center lost to IMI, which is a key element of that calculation.[2]

2. MRIA Also Failed To Prove Causation

Even if the evidence in the record sufficed to provide a reasonable estimate of the scan business that Center in fact lost to IMI, MRIA completely failed to distinguish between the scans lost as a result of Saint Alphonsus's alleged improper assistance to IMI, and the scans that in any event would have been lost to IMI as a strong independent competitor of Center. Instead, MRIA's experts simply "receive[d] assumptions" that Saint Alphonsus's conduct was the legal cause of *all* of the physician decisions to refer a patient to IMI instead of MRI Center. Tr., Vol. 21, p. 4468:22-24; SA Br. 22 & n.3. In its brief to this Court, MRIA stoutly maintains the propriety of this approach, on the ground that it "need not show why it is losing customers to a competitor, but only that it is losing customers." MRIA Br. 17 n.16. (emphasis in original).

MRIA is wrong. Numerous well-reasoned authorities discussed in Saint Alphonsus's opening brief, SA Br. 21-22, including this Court's decision in *Pope*, make clear that MRIA's "method of figuring damages [may not] assume[ ] without any support in the record, that [IMI's] operation would not have won any portion of the [] market [from Center] absent" misconduct by Saint Alphonsus. 103 Idaho at 234, 646 P.2d at 1005. Yet, even after this Court's direction concerning *Pope*, *see Saint Alphonsus Diversified Care v. MRI Assocs., LLP*, 148 Idaho 479,

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[2] Regression analysis is one of many tools that MRIA could have used to try to prove damages. *See, e.g., Zenith Elecs.*, 395 F.3d at 419 (faulting an expert who *failed* to use regression analysis as part of his damages analysis). Indeed, Saint Alphonsus's expert, Dr. Thomas McCarthy, presented such a regression analysis, demonstrating that IMI's downtown location had no material impact on Center's business. Tr., Vol. 27, p. 6136:1-6165:13; Ex. 1001.

498, 224 P.3d 1068, 1087 (2009) ("*SADC*"), MRIA's expert Budge was explicit in saying that he had not "tried to disaggregate" harm caused by wrongful conduct from harm caused by proper competition because that was "not [his] role in this proceeding." Tr., Vol. 21, pp. 4652:24-4653:23.[3] This exact approach has been well described as "simplistic extrapolation and childish arithmetic with the appearance of authority by hiring [an expert] to mouth damages theories that make a joke of the concept of expert knowledge." *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 415 (7th Cir. 1992).

Having thus chosen to ignore *Pope* and the straightforward allocation of damages it requires, MRIA devotes substantial attention in its brief to explaining why it did not have to try to separate the damages that resulted from the lawful entry of IMI as a powerful competitor from the damages that resulted from the misdeeds allegedly committed by Saint Alphonsus.

MRIA's first contention—that *Pope* is inapplicable here because *Pope* is an antitrust case, MRIA Br. 16-17—is obviously wrong. If that were so, this Court would not have highlighted *Pope* in its prior opinion in this case. While the underlying basis for liability in *Pope* was the antitrust laws, the case does not purport to apply a rule unique to the antitrust context.

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[3] MRIA protests vehemently, but incorrectly, that this assertion "is highly misleading" because Budge himself did not use the quoted words. MRIA Br. 29 (emphasis in original). Here is the relevant portion of the testimony:

> Q. ... [H]ave you ever tried to disaggregate, in other words to separate, that portion of what you have identified as damages caused by wrongful conduct from that portion of any decline in the profitability of MRIA that was simply attributable to competitive circumstances in the marketplace?
>
> A. ... I just simply haven't done it because that's not my role in this proceeding.

Tr., Vol. 21, pp. 4653:24-4654:23.

Rather, *Pope* and similar (non-antitrust) cases cited in Saint Alphonsus's opening brief make clear that where, as here, the allegation is that wrongful conduct caused business to migrate from the plaintiff to a competitor, the plaintiff may not proceed on the unexamined and wholly implausible premise that the defendant's actions are legally responsible for 100% of identified business migration. Rather, it must separate the effects of the wrongful conduct from the losses to competition that would have occurred anyway.

Second, and quite remarkably, MRI now seeks to sidestep *Pope* and justify its failure to account for IMI's legitimate competitive effects by asserting a position not advanced at trial, that IMI would not have existed absent Saint Alphonsus's wrongdoing. Specifically, MRIA claims that Saint Alphonsus's alleged misdeeds actually "created" IMI, and that the Hospital was a 50% owner of IMI at the times relevant to this case.

Thus, MRIA asserts baldly that "St. Al's created the competitor" IMI, MRIA Br. 18; that the "competition [from IMI] would never have occurred if St. Al's was obeying its fiduciary and contractual duties," *id.* at 17; and that "MRIA would never have had to worry about these other possible threats to its business [from IMI competition] if St. Al's had not breached it duties," *id.* at 22. MRIA also makes the facially false claim that "the jury found that St. Al's conspired with GSR to form IMI to compete against MRIA's businesses." MRIA Br. 17-18.[4] Further, MRIA contends that "St. Al's attempts to evade causation by distinguishing between itself and IMI" are

[4] The jury, of course, returned a general conspiracy verdict that required a finding only of "an express agreement" to "accomplish an unlawful objective or accomplish a lawful objective through unlawful means." R. 3243, 3260. The jury was not asked to, and did not, find that the Hospital "conspired with GSR to form IMI."

"unavailing given that IMI is 50% owned and controlled by St. Al's." *Id.* at 17. This assertion dovetails nicely with MRIA's "creation" claim, since if the Hospital created and always owned half of IMI, it would arguably be accountable for all of IMI's competitive activities.

These claims that the Hospital created and owned half of IMI's competitive business run headlong into both the evidence and the facts as both parties have previously articulated them. With regard to Saint Alphonsus's claimed ownership of IMI's competitive business, the stipulated facts, recounted in the jury instructions themselves, are that IMI operated with no ownership of the Hospital for nearly two years after it opened, and that in July 2001 Saint Alphonsus first acquired an interest in the non-MRI business of IMI. Tr., Vol. 29, p. 6580:5-19; R. 3227 ¶¶ 4, 5 (Jury Instr. 36). It was also stipulated that the Hospital first acquired its interest in the MRI portion of IMI in 2006, long after the Hospital had lawfully dissociated and its non-compete obligation had expired in 2005. Tr., Vol. 29, p. 6580:5-6581:9; R. 3227 ¶¶ 8, 10, 12.

As for the claim that the Hospital "created" IMI, the consistent evidence at trial showed that the GSR radiologists made a unilateral and independent decision to open their own center, purchased land for the project before even informing Saint Alphonsus, formed IMI, and operated it as an independent entity for nearly two years. SA Br. 4-6; Tr., Vol. 17, pp. 3466-67, 3477, 3520-21; Vol. 20, pp. 4262-67; Vol. 22, pp. 4960, 5215-23; Vol. 24, pp. 5369-70; *see also SADC*, 148 Idaho at 483-84, 224 P.3d at 1072-73 (noting these facts based on the record at the first trial). This evidence was not only undisputed, but it was also the version of events that both parties expressly articulated to the jury. MRIA never contended that IMI was a creation of the Hospital. To the contrary, in its opening statement to the jury, MRIA claimed that the evidence

would show that IMI was an "independent imaging center" and "a competitor of MRIA," that Saint Alphonsus "partnered with IMI while they were still a partner with MRIA," that it "secretly supported the competitor, IMI," and that "[a]s a result of this conduct MRIA lost virtually all of its business to IMI." Tr., Vol. 2, pp. 21:16-22:10. And MRIA was explicit that this "support" was in no way necessary to IMI's existence: It stated in closing argument that if, around the time of IMI's opening in 1999, Saint Alphonsus had "walk[ed] away" rather than continuing to negotiate with the radiologists about IMI, "[t]he radiologists would have been pleased as punch. They didn't need them." Tr., Vol. 29, pp. 6640:20-6641:6.

MRIA's brief likewise demonstrates the falsity of these claims. Specifically, with regard to "creation," MRIA notes that the GSR radiologists "determine[d] to establish IMI," and that "in 1998, GSR announced that it would establish its own imaging center." MRIA Br. 5. In an overview summary of its evidence, it characterizes that evidence as showing that "without St. Al's support and assistance," "IMI would likely never have been the competitor it became"—not that it would never have existed at all. MRIA Br. 18; *see also id.* at 9-11, 18-20 (listing examples of alleged assistance to IMI that supposedly "cost MRIA business").[5]

Finally, the premise that IMI would have competed despite anything that the Hospital did was also incorporated into the structure of the trial, in the form of instructions that required the

[5] Of course, in violation of *Pope*, there was no proof about how much business loss resulted from this misconduct or what sort of competitor IMI *would have been* without the Hospital's alleged support. Indeed, the sole instance of a specific claimed loss of business is MRIA's assertion that, "[i]n some cases, GSR physically walked patients out of MRIA and took them to IMI." MRIA Br. 11. MRIA *did* introduce evidence establishing that this happened one time, causing Center to lose $2,000 in revenue (or $1,401 in profit, *see* Ex. 5083). *See* Ex. 348; Tr., Vol. 18, pp. 3728:16-3730:14; Tr., Vol. 19, pp. 4012:13-4014:23 (all cited in MRIA Br. 11).

jury to apportion responsibility for damages between Saint Alphonsus and IMI/GSR on each of the tort claims. Tr., Vol. 29, p. 6597:10-19; R. 3249 (Jury Instr. 57). MRIA never called this premise into question, or tried to convince the jury that IMI was simply a creation or an *alter ego* of the Hospital, such that the apportionment process was actually irrelevant.

In addition to its new assertion that Saint Alphonsus "created" IMI outright, MRIA also alludes to a somewhat different idea that "St. Al's created the competitor by sabotaging, rather than promoting, MRIA's opportunity to partner with GSR … in IMI," which opportunity it "then took for itself." MRIA Br. 18. This theory, which does not actually suggest that the Hospital "created" IMI in any sense, is the basis for MRIA's claim for disgorgement and fails as a matter of law as discussed elsewhere. *See infra* Part I.E. In all events, however, this usurpation allegation cannot support—and was not presented at trial as supporting—the damages awarded for Center's lost scans because those lost-scan damages, based on what Center would have earned if IMI did not exist at all, bear no relationship whatsoever to the value of the supposedly usurped opportunity to own a part of IMI. *See also* R. 2942 (MRIA admitting during trial that "the proper measure of damages for usurpation is the partnership opportunity which Saint Alphonsus diverted"). The appropriate measure of lost-profits damages for a claim that Saint Alphonsus prevented an MRIA/GSR partnership in IMI from forming would have involved a different model, which Budge attempted to develop but never presented at trial. It would have focused upon the profits MRIA would have received if the allegedly sabotaged MRIA/GSR combination had occurred, which would in turn have depended on such unproven facts as the

structure of the hypothetical partnership, the capital contributions made to it by MRIA, and the share of IMI profits that MRIA would have received from the joint enterprise.[6]

3. MRIA's Purported Legal Arguments In Defense Of Its Lost Profits Damages All Fail

In addition to placing primary reliance on the false premises that Saint Alphonsus "created the competitor," IMI, and was an equal owner of it with GSR at the times relevant to determining liability, MRIA offers several other arguments in defense of its lost-profits damages award. These legal-sounding arguments are largely non-responsive and entirely without merit.

First, MRIA cannot show compliance with *Pope* on the ground it only claimed some of IMI's scan business as lost scan damages. MRIA Br. 28-31. There is no merit to MRIA's contention that *Pope* is somehow satisfied because Budge used a supposedly "conservative" analysis that tracked the migration of referrals only from physicians who had previously referred to Center or were affiliated only with Saint Alphonsus, while excluding referrals from other doctors, such as those who had never before used Center and had no privileges at Saint Alphonsus. MRIA Br. 28-29; *see also id.* at 33 n.24 (noting that Center is claiming only 51% of all of IMI's scans). Budge's analysis fails under *Pope* because, *within the universe of scans that Budge identified as having migrated from Center to IMI*, MRIA and Budge made no effort to distinguish which did so because of Saint Alphonsus's misconduct and which would have

[6] Budge had a theory of what the lost profits would have been as a result of this alleged usurpation, *see* R. 2264, 2268, 2270-71, but the parties sharply disputed what the combined entity would have looked like, *see, e.g.*, R. 1627-29 and MRIA ultimately chose *not* to present to the jury any claim for lost-profit damages (as distinguished from disgorgement) arising out of the alleged usurpation. Thus, the jury was never asked to determine the structure of the MRIA/GSR combination or what net profits the MRIA entities would have earned as part of that combination.

migrated to IMI in any event. The fact that IMI performed *other* scans that, in Budge's expert opinion, were not taken from Center and would *not* have been performed by Center in any event, Tr., Vol. 21, pp. 4600:16-4601:4, is irrelevant, and certainly cannot rehabilitate Budge's failure to perform the analysis that *Pope* requires.[7]

Similarly irrelevant, because it does not cure the *Pope* problem, is the fact that Budge assumed that Center would lose business to other competitors. MRIA Br. 29. Even more far afield is MRIA's assertion that it somehow complied with *Pope* because its other expert used "a conservative discount factor and growth rate" in projecting future losses. *Id.* at 30. Obviously, the unsupported assumption that a defendant caused all of a plaintiff's business losses to a competitor cannot be cured or excused by a purportedly conservative approach to extrapolating future losses from the unproven past losses.

Second, MRIA's contention that Saint Alphonsus's argument improperly depends upon application of a "but for" test for causation, instead of the "substantial factor" test used in certain negligence cases (MRIA Br. 15-16), has no merit for two reasons. Most obviously, the

[7] At one point in its brief, MRIA asserts that "Budge assumed that Center would lose business to IMI due to legitimate competition." MRIA Br. at 29. MRIA offers no citation for this assertion, and it is flatly contrary to Budge's damages calculation, which rejected the idea that any portion of the business lost by Center to IMI was due to legitimate competition, but instead improperly assumed that *all* of the scans that Center lost to IMI resulted from wrongdoing by Saint Alphonsus. *See* SA Br. 20-22.

proximate cause instruction that MRIA proposed (R. 1426) and the trial court gave[8] has been characterized in the Idaho pattern civil jury instructions and by this Court as imposing the "but for" test of proximate cause. *See* IDJI 2.30.1 (titled "Proximate Cause – 'but for' test"); *Newberry v. Martens*, 142 Idaho 284, 288-89, 127 P.3d 187, 191-92 (2005); *Fussell v. St. Clair*, 120 Idaho 591, 592-93, 818 P. 2d 295, 296-97 (1991). Obviously, MRIA cannot now object that it proposed and the court gave the wrong instruction. Further, however the court precisely defined proximate cause, there is no doubt that MRIA was required to prove that Hospital wrongdoing proximately caused the losses claimed. This meant, under *Pope*, that MRIA had to present proof that distinguished the scan losses proximately caused by Hospital misconduct from those not so caused that resulted instead from lawful competition. MRIA's claim fails because, however one defines "proximate cause," MRIA refused to provide such proof and now flatly denies any need to do so. MRIA Br. 17 n.16.[9]

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[8] Instruction No. 33, as given, states in full:

> When I use the expression "proximate cause," I mean a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway. Proximate causation of damages must be proven by a preponderance of the evidence.

Tr., Vol. 29, pp. 6578:25-6579:11; R. 3224. With the exception of the final sentence, added by the Court, Instruction No. 33 was the precise instruction proposed by MRIA. *See* R. 1426.

[9] Thus, for example, MRIA's proof is deficient even under the "substantial factor" test because it fails to distinguish losses for which Hospital misconduct was a substantial factor from losses for which Hospital misconduct was not a substantial factor, or was no factor at all.

Relatedly, MRIA similarly confuses the issue when, focusing on the word "entirely" in Saint Alphonsus's opening brief, MRIA contends that it need not prove that Saint Alphonsus was the "sole" cause of the lost scans. MRIA Br. 21. Saint Alphonsus has never argued that MRIA failed to prove that Saint Alphonsus was the *sole* cause of any particular lost transactions. Rather, MRIA failed to prove that Saint Alphonsus was *any part of* the cause of *all* of the lost transactions. If, for example, some number of patients were referred to IMI solely for the patient's geographic convenience or for insurance-coverage reasons, then misconduct by Saint Alphonsus was no part of the cause in bringing those referrals to IMI. But Budge's model assumes that it was, and awards MRIA damages for those losses. MRIA's error here is to treat its scan losses as a single, undifferentiated injury, rather than recognizing that they in fact constitute many separate business transactions. MRIA was required to offer some plausible analysis to distinguish the proportion of the total that allegedly went to IMI due to misdeeds of the Hospital (under the appropriate causation test) from others that IMI won from Center for non-actionable reasons such as the presence of a new competitor.

Third, in complaining about "impossibly burdensome proof as to each of thousands of transactions in each of several years" (MRIA Br. 24-25) and arguing that "it was not necessary to interview each and every referring physician to determine why the physician sent each scan to IMI" (MRIA Br. 27), MRIA attacks a straw man. As Saint Alphonsus explained the last time this case was before this Court, "[n]o perfect precision is required." 2008 Reply Br. 33. What is required is "a reasonable effort to assess what 'portion of the ... market' IMI would 'have won' absent Saint Alphonsus's alleged assistance to IMI." *Id.* (quoting *Pope* 103 Idaho at 234, 646

P.2d at 1005). MRIA's experts could have interviewed a statistically significant sample of referring physicians and extrapolated from the results. 2008 Reply Br. 33-34.[10] Or its experts could have created an economic model that estimated how much business IMI would have taken from Center absent the competitive advantages allegedly given to IMI by Saint Alphonsus. *Id.* at 34. Numerous avenues existed for the application of "scientific, technical, or other specialized knowledge" on this matter. I.R.E. 702. What MRIA could not do was simply ignore the issue.

Fourth, MRIA is also clearly wrong in vaguely suggesting that the general verdict of conspiracy somehow makes Saint Alphonsus liable for everything IMI did, and thus for every single IMI scan that would otherwise have gone to Center. MRIA Br. 18 ("St. Al's is liable because GSR is its co-conspirator."). "A civil conspiracy itself is not a tort, and until some act is done by the conspirators, there arises no cause of action, and when an act is done which amounts to an actionable tort, then that is the gist of the action." *Dahlquist v. Mattson*, 40 Idaho 378, 386, 233 P. 883, 885 (1925). MRIA did not allege or prove that GSR had an independent legal duty not to compete with Center, and therefore MRIA cannot seek to hold Saint Alphonsus liable for all of the competition that IMI introduced into the marketplace. Rather, the "actionable" wrong at issue was Saint Alphonsus's alleged assistance to IMI's MRI business, and, again, it was incumbent upon MRIA to prove the profits lost *as a result of that alleged assistance*.

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[10] In fact, there was testimony by referring physicians demonstrating that physicians referred to IMI for reasons other than the support allegedly given to IMI by Saint Alphonsus. SA Br. 23. MRIA responds that some of this testimony shows that some physicians changed their referral patterns because of Saint Alphonsus's misconduct. MRIA Br. 20 n.18. But notwithstanding this disagreement over how to read the record, the fundamental point is that MRIA's experts did not rely on this or any other testimony as a basis for extrapolating and modeling Center's losses.

Fifth, MRIA is mistaken when it says that Saint Alphonsus's own consultant, Grant Chamberlain, attributed Center's losses to Saint Alphonsus. MRIA Br. 23. To be clear, as MRIA's counsel himself noted at trial, Mr. Chamberlain was not an expert witness in the case, but rather a consultant who worked for Saint Alphonsus in 2001 and testified at trial as a fact witness. *See* Tr., Vol. 23, p. 5164:15-25. And the only testimony cited by MRIA is Mr. Chamberlain's 2001 projection of Center's future income growth. That a projection turned out to overstate MRIA's future success is hardly evidence that Saint Alphonsus's alleged misconduct caused Center to lose customers. To the contrary, since most of the alleged misconduct had occurred by the time of Mr. Chamberlain's 2001 projection, the far more logical inference is that other factors caused Center's losses.

Sixth, MRIA is not helped by its lengthy discussion of *Prairie Eye Center, Ltd. v. Butler*, 768 N.E.2d 414 (Ill. App. Ct. 2002), a decision from an intermediate Illinois appellate court. MRIA Br. 26-27. In that case, the defendant competed with his former partner both inside of a contractual non-compete radius (in violation of the contract) and outside that radius (consistent with his contractual obligations). The question was how much of the business that the plaintiff lost to the defendant was caused by the lawful competition outside the non-compete radius, and how much was caused by the unlawful competition inside the non-compete radius. *See* 768 N.E.2d at 422-23. Unlike Budge, who merely assumed that Saint Alphonsus caused all of Center's lost business to IMI, the plaintiff's expert in *Prairie Eye* appears to have relied on his expertise and the specific facts and circumstances of the case to estimate what percentage of the plaintiff's lost customers migrated because of the defendant's wrongful conduct and what

percentage of those lost customers migrated because of the defendant's lawful competition. *Id.* (And even then the trial court "did not take [the expert's] figures at face value," but "reduced them" by about 15%. *Id.* at 423.) Thus, the expert in *Prairie Eye* performed the very analysis that *Pope* requires, but that MRIA and its experts refused to conduct.

B. MRIA Failed To Prove Mobile's Lost Profits

A party claiming lost profits must prove "what its costs and profits would have been," and a conclusory assertion, or mere assumption, that its own volumes, costs, and profits "would have been in the vicinity" and "very similar" to the defendant's is insufficient as a matter of law without some proof of correspondence between the two operations. SA Br. 26-27; *see also Trilogy Net. Sys., Inc. v. Johnson*, 144 Idaho 844, 847, 172 P.3d 1119, 1122 (2007). MRIA concedes that Budge did not present evidence of what MRI Mobile's own scan volumes, profits, and costs would have been, but rather just "assume[d]" that Mobile would have had the same volumes, margins, and profits as IMI Meridian. MRIA Br. 37; *see also* Tr., Vol. 21, p. 4546:14-16 (Budge "assume[d] that it would have been the same center with a different name on the door"). And MRIA makes no effort to point to any evidence in the record—because there is none—showing any sort of correspondence between IMI Meridian and this hypothetical MRI Mobile facility. *See* MRIA Br. 35-41. It follows that Mobile's lost profits award cannot stand.

MRIA unpersuasively tries to avoid this necessary conclusion by arguing that *Trilogy* is inapposite because it involved usurpation of the opportunity to contract with a customer to create a software system, whereas this case involves the alleged usurpation of an opportunity to build a new facility. MRIA Br. 36-37; *see also Trilogy*, 144 Idaho at 846, 172 P.3d at 1121. Those

factual differences are irrelevant. Like Mobile's claim here, *Trilogy* involved the appropriate method for calculating lost-profits damages as a result of wrongful competition and the taking of a business opportunity. Nothing in *Trilogy* turned on the nature of the opportunity taken.

MRIA next suggests that it was "reasonable" for Budge to "assume" that Mobile's profits in Meridian would have been identical to IMI's actual profits there because IMI was "the best comparable facility for which data was available." MRIA Br. 37. But the whole point of *Trilogy* is to preclude reliance on the "best available" real life proxy (*id.* at 38) without independent proof of what the claimant's own profits would have been, or evidence that the proxy facility's profits were not just the closest available comparison, but were in fact comparable. No doubt the defendant's profits in *Trilogy* were likewise the "best available" real life comparison where the defendant was the entity that in fact performed the project that the plaintiff claimed it would have performed but for the usurpation. But this Court nevertheless held such proof insufficient, and rightly so, where there was no evidence that the actual facts drawn from another party's experience are reasonably applicable to the plaintiff's case. Thus, contrary to MRIA's implicit assumption that a plaintiff in a usurpation case must be able to prove its case by relying on the profits of the "best available" proxy (typically the usurping defendant), the lesson of *Trilogy* is that such proxy evidence is, without more, insufficient to prove damages.

MRIA tries to explain why IMI's profit margin was supposedly a more reasonable proxy than MRI Mobile's established profit margins on its mobile magnets. MRIA Br. 38. Here, again, MRIA falls victim to the faulty belief that it can rely on IMI's profit margins, without proving that its own profit margins would have corresponded thereto, simply by establishing that

IMI is a better comparison than any other. MRIA needed to establish that IMI's profit margins were an appropriate comparison, and it never tried to do so (probably because, as a multi-modality facility, IMI's profit margins were higher than MRI Mobile's would have been).

More importantly, MRIA completely ignores the more egregious error in Budge's assumption that "it would have been the same center with a different name on the door," namely, the assumption that Mobile's hypothetical facility would have had the same *scan volumes* as IMI. *See* SA Br. 27-28. By failing to defend the reasonableness of this assumption, even under the faulty premise of "best available correspondence," MRIA Br. 38, MRIA necessarily concedes that there was no evidence anywhere in the record suggesting that an MRI Mobile facility in Meridian would have had the same customers and scan volumes as IMI's Meridian facility. *See also* SA Br. 27-28. This lack of evidence dooms MRIA's claim for damages under *Trilogy*, even apart from the undisputed facts (SA Br. 28-29) establishing that Mobile's scan volumes would have been much lower than IMI's—facts that forced Budge to concede that his assumption of equivalence "really overstepped," Tr., Vol. 21, pp. 4637:23-4638:11.[11]

Finally, MRIA contends that all this does not matter because, but for the Hospital's usurpation of MRIA's opportunity to partner with the radiologists in 1999, "it would have been

[11] MRIA tries to take issue with the factual record, but it cannot and does not deny that the radiologists at the Mobile facility would not have been the same radiologists reading scans at IMI Meridian. MRIA Br. 39. And it cannot deny that it introduced no evidence to support Budge's "assumption" that there was no room for additional competitors in the Meridian market. (That IMI later used one of its Meridian magnets to expand into another market, Eagle, hardly indicates that Meridian could not support additional competitors.) In faulting Saint Alphonsus for failing to put on more evidence of the differences between the Mobile and IMI facilities, MRIA again improperly tries to shift the burden of proof.

an MRIA entity with the radiologists in Meridian." MRIA Br. 39. But MRIA's "lost profits" theories were not proffered in support of this usurpation claim, and any calculation of profits lost by the MRIA entities as a result of that alleged usurpation would depend on facts never put to the jury, such as the ownership structure of the hypothetical MRIA/GSR partnership, the capital contributions made to it by MRIA, and the share of profits that MRIA would have received from the enterprise. *See supra* pp. 12-13.

C. MRIA Failed To Prove Entitlement to Post-Dissociation Damages

Because the trial court had ruled that Saint Alphonsus could lawfully compete after April 1, 2005, MRIA could recover damages arising after that date only if those damages were caused by wrongdoing prior to that date. *E.g.*, Tr., Vol. 21, pp. 4364:16-4365:3. But MRIA failed to introduce any evidence that pre-April 1, 2005 conduct prevented it from competing for scans after that date or caused any particular portion of the post-April 1, 2005 referrals to IMI. SA Br. 31-35. Instead, MRIA's expert admitted that his lost-scan estimate "assumes" that all of the post-April 2005 referral decisions resulted from Saint Alphonsus "not" being "able to lawfully compete" after April 2005. Tr., Vol. 21, p. 4564:11-17.

As it does in attempting to excuse its noncompliance with *Pope*, MRIA contends that losses suffered after April 1, 2005, are recoverable because the jury could have inferred that Saint Alphonsus's wrongdoing created IMI. MRIA Br. 43. As already explained, MRIA's "created the competitor" rationale for its damages is a creation of counsel on appeal. This theory was not presented to the jury, and MRIA offered no evidence to the jury supporting it. *See supra* pp. 9-13.

MRIA also contends that "unrebutted" evidence supports the conclusion that Center "spiraled ... to an essentially failed enterprise while St. Al's was bound by the noncompete." MRIA Br. 43; *see also id.* (quoting testimony of Jack Floyd); *id.* at 46-47 (contending that Saint Alphonsus cannot refute that Center was essentially destroyed by pre-2005 conduct). But this is plainly untrue, and is rebutted by MRIA's own evidence. That evidence showed that while Center lost some scan volume to IMI from 1999 to 2005, Center was still a powerful competitor with substantial volumes, revenues, and profits on April 1, 2005. *See* SA Br. 35.

Specifically, MRIA showed that Center handled 7,369 scans in 2004 (the last full year that the Hospital could not compete), down only slightly from Center's volume of 8,794 scans in 2003 (during the height of the alleged wrongdoing), and roughly equal to Center's scan volume in 1999 (the year IMI opened). Exs. 899-R & 5012; R. 1671. Even in 2005, MRI Center had 5,651 scans, and of those, 2,083 were referrals from doctors who also sent patients to IMI, even though Saint Alphonsus's non-compete had ended on April 1, 2005. *Id.*; Ex. 4566. And MRIA's own expert believed that MRIA would have been losing scan volumes from 2001 to 2005 in any event. Ex. 5012 (showing a decline in MRIA "But-for Scan Volumes" over the relevant time period). It is only *after* the expiration of the non-compete in 2005 that the alleged gap between MRIA's actual scan volume and its projected but-for scan volume began to increase and Center experienced the precipitous declines in scan volume that account for most of the damages awarded. *See id.*[12] This subsequent loss of customers is obviously not proof that

[12] Contrary to MRIA's claims of wrongdoing, the unrebutted statistical evidence was that MRIA's drop in scan volume between 2005 and 2006 was statistically correlated with IMI's

Center had already failed when Saint Alphonsus's legal obligations ended. It is proof of the opposite.[13]

MRIA's response, that declines in scan volumes in the years *after* the expiration of the non-compete permitted the jury to conclude that Center was unable to recover from the damage done before the end of the non-compete period, MRIA Br. 45, is a tautology. *Pope* compels MRIA to prove that these declines were caused by pre-2005 conduct, as opposed to other factors like the Hospital's subsequent lawful opening of a competing facility on the Hospital campus. MRIA's assertion that the jury can speculate as to cause does not satisfy the burden of proof.

Relying on anecdotal evidence of a physician who stopped using Center because of alleged wrongdoing, MRIA also contends that once Center had lost a physician-customer, "it [wa]s difficult to win that physician back." MRIA Br. 44. This theory might support MRIA's damages claim if the evidence showed that MRIA had lost all its customers by April 1, 2005, or if MRIA had limited its damages claim to physicians who were no longer patronizing Center by April 1, 2005. But with 7,369 scans in 2004, and 5,561 in 2005, which included nine months of lawful competition by the Hospital, there is just no support for MRIA's contention that all of its post-April 1, 2005 losses resulted from customers who abandoned Center due to actions taken

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opening of an on-campus Hospital location in December 2005, well after the non-compete had expired. Tr., Vol. 27, p. 6180:6-12; Ex. 1001; R. 3227, #11. MRIA's own chart (Ex. 5012) bears this out.

[13] MRIA seems to contend that "by 2006" its scan volume was "almost non-existent" and comprised of low paying scans that insurance companies "forced" doctors to send to MRIA. MRIA Br. 44 n. 31. But MRIA's citations say nothing of the sort. *See* Tr., Vol. 19, pp. 3983:16-3985:7 (discussing 2003 dispute over IMI's own referrals to MRI Center); Tr., Vol. 26, pp. 5779:3-15, 5807:3-12 (testimony about personal referral practices of two physicians). In any event, Center's scan volumes *in 2006* are not evidence of Center's status on April 1, 2005.

prior to that date. MRIA needed to show how thousands of post-April 2005 referral decisions of hundreds of physicians were influenced by years-old misconduct as opposed to legal competition. MRIA did not even try to do so, and thus cannot recover any damages after April 1, 2005.

MRIA stubbornly insists that there was no reason for Budge and Wilhoite to change their analysis between the two trials. MRIA Br. 45-46. Of course, the sufficiency of the damages evidence from the first trial is not at issue here. But one critical thing did change: Saint Alphonsus's dissociation was ruled lawful rather than unlawful. Thus, whereas the Hospital's opening of a competing facility on campus was arguably viewed as unlawful during the first trial, that conduct—and the scans it caused Center to lose—now must be viewed as perfectly lawful. As a result, MRIA had a new burden at the second trial that it did not have at the first trial: to show that post-2005 damages were caused by pre-2005 misconduct. That Budge and Wilhoite made no changes in their analyses to account for this critical difference is further proof that MRIA made no effort to make this required showing.

Citing *Bushi v. Sage Health Care, PLLC*, 146 Idaho 764, 203 P.3d 694 (2009), MRIA contends in the alternative that it is entitled to post-2005 damages "caused by post-April 2005 conduct" on its breach of fiduciary duty claim if it proved that Saint Alphonsus's "technically-lawful dissociation" was "improperly motivated." MRIA Br. 48-49. But, as explained elsewhere, *Bushi* does not permit MRIA to convert the exercise of an unqualified statutory right to dissociate into a breach of fiduciary duty through allegations of improper motive. *See* SA Br. 45; *infra* pp. 31-35.

Finally, MRIA incorrectly contends that, whatever the merits of the Hospital's challenge to *Center's* post-April 1, 2005 damages, it waived its argument against *Mobile's* post-April 1, 2005 damages. MRIA Br. 41. To the contrary, in its post-trial motion, Saint Alphonsus urged the trial court to reduce the lost-profit damages awarded to the MRI entities by the $40,154,935 in claimed losses for *both* Center *and* Mobile occurring after April 1, 2005. R. 3878. This included over $20 million in damages attributable to Mobile's alleged lost profits. *Id.* And while MRIA is correct that Mobile's damages were premised on a different theory than Center's (usurpation, not diverted scans), Mobile's post-2005 lost-profits damages are likewise barred by the principle that Saint Alphonsus's termination of its relationship with MRIA, and the subsequent expiration of the non-compete obligations, cut off liability for lost profits under both tort and contract principles. *See* SA Br. 30-31 & n.6.

D. MRIA Failed To Prove "Lost Value" Damages

The trial court erred in allowing MRIA to revive its abandoned claim for "lost value" damages in the middle of the retrial, after Saint Alphonsus had been deprived of all opportunity for discovery on Center's present value. SA Br. 36. That claim in any event is unsupported by substantial evidence because MRIA introduced no evidence of causation. *Id.* at 36-37.

MRIA offers no response to its failure to prove causation, except to refer the Court to the same faulty arguments offered in defense of its failure to prove that Saint Alphonsus caused the alleged scan migration. MRIA Br. 51. As discussed above, those arguments are not persuasive. *See supra* Part I.A.2. And in any event, the failing here is ever starker. Without any specific analysis at all, MRIA seeks to collect the full $25 million of alleged lost value of the business

from 2001 until 2011, when Center was said to be worthless, even though there is no evidence that Center was worthless on April 1, 2005, and even though Saint Alphonsus had an unquestioned right to compete during the last six of those ten years.[14]

E. MRIA's Disgorgement Claim Is Time Barred and Unsupported By Substantial Evidence

MRIA's claim for the disgorgement of profits based on the alleged usurpation of the opportunity to partner with GSR was procedurally improper, barred by the statute of limitations, and, insofar as the trial court failed to account for the $11.2 million Saint Alphonsus spent to acquire the business, unsupported by substantial evidence. SA Br. 37-42.

MRIA appears to concede that its disgorgement claim is untimely if the usurpation occurred in 1999. MRIA Br. 56. It also concedes that the disgorgement claim was not part of the first trial, but rather was belatedly asserted just prior to the second trial. MRIA Br. 52. MRIA nevertheless contends that Judge McLaughlin decided that the disgorgement claim was not time barred in an unappealed ruling that now binds Saint Alphonsus as law of the case. MRIA Br. 54. Of course, it was impossible for Judge McLaughlin to rule upon, or for Saint Alphonsus to appeal a ruling on, a claim that was not in the case at the time, nor did Judge McLaughlin purport to do so. 2007 Tr., p. 4196:9-11 ("*the claims asserted by MRIA* are not barred by the statute of limitations" (emphasis added)); *Taylor v. Maile*, 146 Idaho 705, 709, 201

[14] On the procedural error, it is irrelevant that MRIA disclosed its "lost value" claim, and Saint Alphonsus had a fair opportunity for discovery on that claim, prior to the first trial. MRIA Br. 50. Discovery in 2007 obviously could shed no light on the value of Center in 2011—and Saint Alphonsus had no opportunity for discovery on *that* issue because MRIA ambushed the Hospital by reviving this abandoned claim in the middle of the retrial.

P.3d 1282, 1286 (2009) (law-of-the-case only "prevents consideration on a subsequent appeal of alleged errors *that might have been*, but were not, raised in the earlier appeal" (emphasis added)). Thus, the trial court here necessarily erred when it held (Tr., Vol. 28, p. 6315:7-6316:16) that MRIA's claim was timely solely because Judge McLaughlin had already decided the issue.

MRIA alternatively asserts that its usurpation claim is timely because it "was continuous in nature" insofar as the "misappropriation was not completed until July 2001." MRIA Br. 54-55. But the record does not support this assertion. Rather, as described at length by MRIA, the usurpation claim relied on a factual scenario, based wholly on the testimony of Dr. Prochaska, in which Hospital CEO Bruce supposedly volunteered to take over MRIA's negotiations with GSR in June 1999, and then acted in secret for six months to "kill[] any hope of a deal" by December 1999, MRIA Br. 6-8, while Prochaska "stepped back and just waited for whatever information came [his] way." Tr., Vol. 3, pp. 257:13-18, 263:12-13.[15] Prochaska also testified that there no longer any chance for a deal between MRIA and GSR following an angry meeting in mid-December 1999. Tr., Vol. 6, pp. 821:18-823:7. Faced with this evidence, MRIA's counsel

[15] MRIA now tries to buttress Prochaska's self-serving testimony by claiming wrongly that Sandra Bruce "admits that she was asked to step in to finish up the MRIA-GSR deal." MRIA Cross-Appeal Br. 27. Bruce testified that she routinely worked in various ways to be supportive of MRIA's negotiations. Tr., Vol. 8, pp. 1252:17-25, 1253:8-14; Vol. 10, p. 1703:18-1704:14. At the same time, though, she expressly denied either being asked to take over, or actually taking lead responsibility for, "closing the deal" for MRIA. Tr., Vol. 10, p. 1706:2-18. Other witnesses confirmed the accuracy of that testimony. Tr., Vol. 12, pp. 2230:9-23, 2339:11-2341:5 (Schamp stating that she had unofficial "counselor" role, but was never told that Saint Alphonsus was taking charge of the MRIA-GSR negotiations); Tr., Vol. 16, p. 3315:5-9 (GSR's Jeff Cliff, who was actively involved in the MRIA-GSR negotiations, did not recall Saint Alphonsus taking over, or even participating in the negotiations).

conceded at trial that the "usurpation" occurred at a "point in time" in late 1999. SA Br. 38. This ought to resolve the matter on appeal.

But the disgorgement judgment would need to be vacated even if this Court were to conclude that some evidence supports MRIA's assertion because then the question whether the usurpation occurred in 1999 or continued until 2001 is one that the jury, not the court, should have decided. *See, e.g.*, *Reis v. Cox*, 104 Idaho 434, 438, 660 P.2d 46, 50 (1982) ("where there is conflicting evidence as to when the cause of action accrued, the issue is one of fact for the trier of fact"). Indeed, the trial court initially held that there was a factual dispute as to when any "partnership opportunity" ceased to exist, that "[i]t is for the jury to determine on what date the usurpation of partnership opportunity occurred," and that "[i]f the jury finds it occurred in 1999, this claim would be barred by the statute of limitations." Tr., Vol. 21, p. 4365:4-21; R. 2615-16. MRIA likewise conceded that the date of the usurpation was a factual issue for the jury as late as the directed-verdict stage. R. 2939. It was only after the trial court incorrectly concluded that Judge McLaughlin had ruled on the timeliness of this usurpation theory that was never, in fact, placed before him, that the question was taken away from the jury. *See* Tr., Vol. 27, pp. 6051:13-6052:2. Thus, if this Court does not hold the usurpation claim time barred because it accrued in 1999, then the disgorgement award should be vacated and a new trial ordered to allow the jury to decide the facts that determine whether the claim is untimely.

With respect to the amount of the disgorgement award, MRIA does not deny that Saint Alphonsus spent $11.2 million to purchase its share of IMI's MRI business, nor does it deny that, in the fashioning of disgorgement awards, "[d]isloyal fiduciaries are uniformly reimbursed for

the purchase price of property acquired in conscious breach of their duty of loyalty." *Restatement (Third) of Restitution and Unjust Enrichment* § 51 cmt. h. (2010); *see also id.* § 51(5)(c) (defendant "may be allowed a credit for money expended in acquiring or preserving the property or in carrying on the business that is the source of the profit subject to disgorgement"); *Uzyel v. Kadisha*, 188 Cal. App. 4th 866, 893 n.19 (2010) (same).

MRIA attempts to avoid application of this settled rule by contending that MRIA sought only the "'dividends' or profits realized by St. Al's," rather than the Hospital's "ownership interest" in IMI. MRIA Br. 56. Citing the testimony of its expert Budge that Saint Alphonsus still has an interest in IMI's future earnings, MRIA speculates that Saint Alphonsus's investment in IMI therefore has some additional unspecified value as a going concern. MRIA Br. 56 (citing Tr., Vol. 21, p. 4521:2-16). But this misstates both the record and basic economics. As this Court surely knows, and as MRIA's other expert, Wilhoite, admitted, "[t]he value of a business is based on the expected future returns that that business is likely to produce. So the process that you go through to complete a business valuation is identical to the process you would go through to estimate future or expected lost profits." Tr., Vol. 22, pp. 4677:25-4678:5. Budge accordingly made clear that he was referring to the value of "future earnings" that had not yet been realized "[a]t this date in time in 2011." Tr., Vol. 21. p. 4521:10-12. However, MRIA's other expert, Wilhoite, did estimate the value of those future earnings (at over $8 million), and his estimate was included in the disgorgement award. Tr., Vol. 22, pp. 4724:11-4725:7; Ex. 5082. Thus, Saint Alphonsus spent $11.2 million to obtain an "ownership interest" equal to the $21.4 million in past and projected future profits that the trial court awarded as a disgorgement

remedy. By failing to deduct the $11.2 million that it cost Saint Alphonsus to purchase this stream of profits, the trial court grossly over-estimated the gains realized by Saint Alphonsus.

Finally, the fact that Wilhoite chose to end his future projections at 2015 obviously did not entitle MRIA or the trial court to ignore the Hospital's $11.2 million investment, especially given that MRIA, the party with the burden of proof, offered no evidence about the existence or value of post-2015 profits, and certainly never showed that those far-distant future profits would equal or exceed $11.2 million.[16]

II. SAINT ALPHONSUS WAS DENIED A FAIR TRIAL

The opening brief explained how numerous highly prejudicial legal errors denied Saint Alphonsus a fair retrial. MRIA's response largely sidesteps the legal arguments actually made, and thus fails to seriously contest this conclusion.

A. The Trial Court Wrongly Invited The Jury To Find, And The Jury Very Likely Concluded, That Saint Alphonsus's Rightful Dissociation Was A Breach Of Fiduciary Duty

As explained in the opening brief, several rulings of the trial court invited the jury to rely on Saint Alphonsus's dissociation from MRIA to support a finding of breach of fiduciary duty if an "improper [including financial] motivation" for that action was shown. SA Br. 43-48. Such a conclusion contravenes the trial court's pre-trial ruling that Saint Alphonsus's dissociation was lawful under RUPA, whose text makes such action "wrongful" only if it contravenes the contract

[16] Wilhoite did not explain why he ended his future projections at 2015. He and MRIA may have thought themselves bound by this Court's prior ruling that MRIA cannot claim lost-profit damages after the 2015 expiration of the term of MRI Center. *See SADC*, 148 Idaho at 497, 224 P.3d at 1086. Of course, if that were so, it would be even more inappropriate to allow MRIA to recover an $11.2 million windfall, since the purpose of that ruling was to *limit* MRIA's recovery to the lifetime of the limited partnership entities.

in one of three specified ways not applicable here. R. 556-559, 1234; *see also* SA Br. 45.

Unfortunately, the pre-trial ruling also noted that "there is no liability *simply* for the act of dissociating," R. 1238 (emphasis added), and the notion that statutorily "rightful" conduct could be "wrongful" if done with an impure state of mind took on a life of its own at trial. After the trial court first asserted the potential relevance of *Bushi*, 146 Idaho 764, 203 P.3d 694, *see* Tr., Vol. 4, pp. 587:24-588:14, 671:4-672:20, MRIA spelled out more precisely the reasoning that, even if "dissociation was a legally proper act ... you can be held liable for damages" if "you do it for an improper purpose." Tr., Vol. 9, pp. 1582:21-1584:3.

The trial judge subsequently invoked precisely this reasoning in admitting unrelated prior bad acts evidence on the ground that it might help illuminate the Hospital's improper "purely monetary" motivation for dissociation. *See* SA Br. 46, *infra* pp. 35-36; Tr., Vol. 15, pp. 2890:7-2892:10; Tr., Vol. 21, p. 4412:14-19 ("The fiduciary obligation claim involves the subjective intent of the individuals involved when they are taking actions that might otherwise be consistent with the contract, but they are taking those actions for an inappropriate purpose."). And, to bring the *Bushi* reasoning to bear on the facts of this case, the court ultimately instructed the jury that even an "alleged action" that "adhere[s] to the strict legal requirements of" the contract may still "violat[e] a fiduciary obligation to its partners if the action taken was improperly motivated, such as taking advantage of its partnership position to obtain financial gain." Tr., Vol. 29, p. 6593:14-25; R. 3242 (Jury Instr. 50).

The trial court's delivery of this instruction focused the jury's attention on the Hospital's dissociation, because of the dissociation's obvious impact on MRIA's competitive prospects, and

because the jury was told that the "mere act of dissociation" was lawful and thus necessarily consistent with the contract. Hr'g Tr., p. 416:19-20 (Aug. 30, 2011); R. 3194 (Jury Instr. 5). None of the other alleged misdeeds, which MRIA catalogs in its brief (at 9-12, 18-20), were ever said by the court to be proper under the contract or otherwise lawful standing alone.

MRIA's first response to these contentions is to baldly defend the challenged line of reasoning, by asserting that "the jury could properly conclude" that Saint Alphonsus's "technically-lawful dissociation" was done in "bad faith" and was "itself part of the ongoing breaches of fiduciary duty." MRIA Br. 49. Initially, MRIA takes this position as a fall-back defense of its post-2005 damages, arguing that damages caused by a dissociation that breached fiduciary duties are properly recoverable. *Id.* at 48-49; *see supra* p. 25. But MRIA also vehemently defends the *Bushi* line of reasoning in response to the Hospital's fair-trial argument, scoffing that the inference of a breach of fiduciary duty based on improper motivation is no less appropriate where the disputed conduct is authorized "under a statute"—here RUPA—than where, as in *Bushi*, it is simply in "compliance with partnership rights under a partnership agreement." MRIA Br. 57 (emphasis in original). And, it concludes, "[o]bviously, MRIA considers this a distinction without a difference." *Id.*

Of course, the distinction is actually quite critical. RUPA rewrote partnership law to create an affirmative power of partners to dissociate, Idaho Code § 53-3-602(a), and provided specifically that "[a] partner's dissociation is wrongful only" in three specified circumstances, *id.* § 53-3-602(b)(1) and (2). *See also* SA Br. 45. The trial court determined that none of the statutory conditions for wrongfulness exist here. R. 555-559. Certainly *Bushi* does not support a

judicial rewriting of the statute to add "improper motivation" as a fourth factor that can render "wrongful" a dissociation that is defined as "rightful" under the words of the statute. *See SADC*, 148 Idaho at 485-89, 224 P.3d at 1074-78.

While vigorously defending application of this specious reasoning to this case,[17] MRIA is also quick to deny that the trial judge here instructed the jury in accordance with it. MRIA Br. 57, 62. It points to the court's Instruction No. 37, which acknowledges the Hospital's "right" to dissociate "under Idaho law," and the unavailability of damages for that particular conduct. MRIA Br. 62; *see* Tr., Vol. 29, pp. 6581:16-6582:18. And it argues that the *Bushi* instruction (to which it acknowledges the Hospital repeatedly objected, MRIA Br. 58 n.40), was perfectly appropriate because it did not specifically reference "dissociation" or RUPA. MRIA Br. 57-58.

But the trial court was clear throughout—including in its very first, pre-trial instruction to the jury—that it was only the "mere act of dissociation" that is proper under Idaho law. Hr'g Tr., p. 416:19-20 (Aug. 30, 2011); R. 3194. The same message pervaded the court's orders on the subject, *e.g.,* R. 1238 ("no liability *simply* for the act of dissociating" (emphasis added)), and its discussions with counsel, Tr., Vol. 28, p. 6399:14-24 (counsel may not argue that "act of dissociating is, *itself*, a basis for liability" (emphasis added)).

The possibility that dissociation plus something else could give rise to liability was thus expressly left open, and in this context, the *Bushi* instruction defined just how fiduciary duty

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[17] In its cross-appeal brief (at 18-21), MRIA also presses the very similar meritless argument that it should have been allowed to prove wrongful dissociation based on a "common law breach of contract," even though none of RUPA's statutory conditions for a wrongful dissociation were present here. *See* Cross-Respondents' Brief ("SA Cross-Appeal Br.") 18-21.

liability might be found based on dissociation plus improper—meaning financial—motivation. In so doing, it carried out the intentions manifested on the record by both MRIA counsel, *see* Tr., Vol. 9, pp. 1582:21-1584:3, and the trial court, s*ee* Tr., Vol. 15, pp. 2890:7-2892:10 (justifying admission of Dr. Wilson's testimony). The instructions must be viewed "as a whole to determine whether [they] fairly and adequately present the issues and state the law." *Mackay v. Four Rivers Packing Co.*, 151 Idaho 388, 391, 257 P.3d 755, 758 (2011). So viewed, the instructions here clearly communicated that a dissociation that is lawful standing alone may be a breach of fiduciary duty if improperly motivated.

The trial court compounded its instructional error by: (1) allowing the testimony of Dr. Steven Wilson, who had no involvement in the issues under dispute, to aid MRIA's claim that Saint Alphonsus had an improper financial motivation for dissociating (SA Br. 45-47); (2) refusing to redact portions of two memoranda from a Saint Alphonsus consultant stating that "there may be a risk of St. Alphonsus breaching its fiduciary responsibilities to the L[imited] P[artnership]s" if it dissociated from MRIA (*id.* at 47); and (3) forbidding Saint Alphonsus from telling the jury that it had "rightfully" or "lawfully" dissociated from MRIA (*id.* at 47-48). MRIA's brief offers little defense of these rulings.

The testimony of Dr. Wilson was admitted precisely to prove that Saint Alphonsus had an improper financial motivation for its dissociation. After noting the disagreement between the parties over why the Hospital elected to withdraw, Tr., Vol. 15, pp. 2890:17-2891:17, and the relevance of "motivation" as a "major factor" in determining whether a breach of fiduciary duty has occurred, *id.* p. 2892:5-8, the court ruled that "evidence of prior conduct of a similar nature is

admissible under Idaho Rule of Evidence 404(b) to prove motive or intent," *id.* p. 2892:8-10. Hence Dr. Wilson's allegedly unexplained termination was somehow seen as a "fact of consequence" bearing on the question whether the Hospital dissociated from MRIA to get "more income from medical imaging services," and thus for "purely monetary gain." *Id.* p. 2891:18-2892:4; *see also* SA Br. 46. MRIA argues that Dr. Wilson's testimony was admissible because it was also "impeachment" of Sandra Bruce's failure to recall whether Dr. Wilson was terminated without being given a reason, MRIA Br. 60-61, but that was only a secondary justification for its admission, Tr., Vol. 15, pp. 2893:4-2895:7. Importantly, no limiting instruction of any kind was given as to the relevance of the testimony. *See id.* pp. 2906:4-2910:11.[18]

With respect to the court's decision not to redact the two memoranda expressly stating that Saint Alphonsus's withdrawal risked "breaching its fiduciary responsibilities to the LPs," MRIA offers the non-response that the court's ruling was not based on *Bushi*. MRIA Br. 62. But the point is that these documents presented the jury with the unambiguous suggestion, by the Hospital's own cautious consultant hypothesizing about possible outcomes, that dissociation could be a breach of fiduciary duty. Everyone knew before trial that, in fact, it was not such a breach, and the court redacted several other documents for precisely this reason. *See* R. 1351 (holding that other "sentences regarding Saint Alphonsus's withdrawal or termination must be redacted because Saint Alphonsus's dissociation is no longer at issue."). But the court repeatedly

[18] While theoretically Saint Alphonsus could have asked for an instruction limiting Dr. Wilson's testimony under Rule 404(b) to its relevance in proving a financial motivation for dissociation, the Hospital elected not to do so because such an instruction would have aggravated the prejudice by highlighting a possibility of wrongful dissociation based on motivation.

refused to redact these references to withdrawal constituting a breach of fiduciary duty, R. 1351, 2085, thus reinforcing the misleading message of the *Bushi* instruction with evidence that Saint Alphonsus was warned back in 2001 that leaving the partnership could be a fiduciary breach.

MRIA likewise has no answer for why, if there really was to be no liability based on the dissociation, the court granted MRIA's motion to prevent the Hospital from describing the dissociation as "lawful" or "rightful," as MRIA had been allowed to use "wrongful" at the prior trial. SA Br. 48. This ruling, too, confirms the trial court's legal error and contributed to the prejudicial consequences that require a new trial.

In summary, the jury, on this deeply flawed record, was invited to, and very likely did, conclude that the Hospital's dissociation was the central and most important misdeed that injured MRIA. Because this Court's decision in *Bushi* does not allow a partnership withdrawl that is "rightful," and thus authorized, under the precise terms of RUPA to become "wrongful" if financially motivated, a new trial is clearly required. *See, e.g., Vanderford Co. v. Knudson*, 144 Idaho 547, 555, 165 P.3d 261, 269 (2007) ("Reversible error occurs when an instruction misleads the jury or prejudices a party."); *Munns v. Swift Transp. Co.*, 138 Idaho 108, 111, 58 P.3d 92, 95 (2002) (new trial required based on "misleading" instructions, if it is "plausible that the jury may have reached its verdict based on or guided by the erroneous instructions").

B. The Trial Court Prejudicially Erred in Failing to Construe the Plain Language of the Saint Alphonsus-GSR Radiology Contracts, Which Gave Saint Alphonsus No Right to Force GSR to Serve MRIA's Outpatients

MRIA presented extensive evidence and argument to the effect that Saint Alphonsus breached fiduciary duties to MRIA by not exercising a supposed contractual right to compel

GSR to provide night and weekend services for MRI Center's outpatient business. SA Br. 49 n.18 (collecting transcript references). This argument—which was not even mentioned in closing argument at the first trial, 2007 Tr., pp. 4293-4326, 4381-93[19]—became central to MRIA's case at the second trial after it lost its judgment of liability based on wrongful dissociation. It was discussed in the testimony of many witnesses, *see* SA Br. 49 n.18, and, after the trial court erroneously denied the Hospital's motion for directed verdict on the claim, it became the centerpiece of MRIA's closing argument, *see* Tr., Vol. 29, pp. 6627-30, 6670-71, 6681-82, 6810-15, 6835.

Saint Alphonsus showed in its opening brief that the plain, unambiguous language of the 2001 radiology service contract at issue (Ex. 4229), as well as the 1997 agreement that preceded it (Ex. 4033), gave Saint Alphonsus no such right. SA Br. 50-51. These agreements pertain only to GSR's obligation to perform services in the "Saint Alphonsus Regional Medical Center" (a.k.a. the "Medical Center"), which the contract specifically says is "own[ed] and operate[d]" by the "Section 501(c)(3) non-profit corporation" of the same name. Ex. 4229 at 4; Ex. 4033 at 1. The 2001 contract states that "[f]or purposes of this Agreement, the Medical Center also includes the Breast Care Center located at 6200 W. Emerald in Boise, Idaho, but does not include any affiliates or other ancillary operations of Saint Alphonsus located on Saint Alphonsus' campus or otherwise." Ex. 4229, p.4, Recital A. The contract also expressly

[19] In fact, in rejecting MRIA's request to amend its complaint to add a claim for punitive damages against GSR prior to the first trial, Judge McLaughlin had noted, among other points, that "Gem State Radiology contracted with Saint Alphonsus to read images of all hospital inpatients and emergency room patients. The record is clear that Gem State Radiology had no obligation to read outpatient images from the MRI Center ...." 2007 R., Vol. V, p. 843, 865-66.

excludes "MRI Center of Idaho, and MRI Mobile" from the non-compete clause that GSR executed, which would have been wholly unnecessary if, as MRIA claims, MRI Center was part of the "Medical Center" to which services are owed under the contract. Ex. 4229, § 11.1.1(ii).

MRIA, as it did in the trial court, substantially fails to address the contract's very specific dispositive language, instead addressing itself only vaguely to the assertion that the term "Medical Center ... somehow exclud[es] [MRI] Center." MRIA Br. 67.[20] MRIA then talks around the contract's unambiguous language in various ways. In sequence, it asserts wrongly that Saint Alphonsus witnesses took the "exact opposite" position on the meaning of the contract at the first trial, MRIA Br. 63, 67 (emphasis in original);[21] that it is unimportant what the contract

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[20] MRIA does, for the first time ever in this case, argue that Saint Alphonsus "owned" MRI Center, and thus satisfied at least that contract condition to it being part of the Medical Center. MRIA Br. 68. Obviously, however, MRI Center is neither "own[ed][nor] operate[d] by the non-profit Hospital" Saint Alphonsus. Ex. 4229, p. 4, Recital A. Saint Alphonsus never had more than a minority limited partnership interest in Center, whose operation was always controlled by MRIA in all respects. *See* Ex. 4023, § 5.1.2 (Saint Alphonsus held only two of ten votes in MRIA); *id.* § 5.4 (MRIA's business decisions, with limited exceptions, required only five of ten votes); Ex. 4024, § 1.3.2 (MRIA general partner of MRI Center); *id.* § 4.1 (providing that "business and affairs" of Center "shall be conducted by the General Partner," *i.e.*, MRIA).

[21] It would be very strange if the Hospital witnesses had testified as MRIA claims, given that Judge McLaughlin had himself concluded that the radiology services agreement contained no such right, s*ee supra* n.19, and MRIA did not even press this argument at the first trial. Not surprisingly, the testimony cited in MRIA's brief (at 63), by Hospital employee witnesses, COO Schamp and Chief Nursing Officer Corbett, discussed the contract in terms that neither affirmed nor denied MRIA's current meritless interpretation. *See* Tr., Vol. 11, pp. 2036:23-2037:15, 2038:2-12 (quoting Schamp's 2007 deposition); Tr., Vol. 20, p. 4281:7-20 (quoting Corbett's prior-trial testimony). But when MRIA decided to advance this argument in the retrial, Schamp and Corbett testified unequivocally that the contract extended only to patients "that we, as a hospital, billed for," thus excluding Center outpatients, Tr., Vol. 11, pp. 2036:15-18, 2037:18-24, and flatly denied that the "contract provides that the radiologists shall have responsibility to provide radiologic imaging services that include all of the services provided by MRI Center," Tr., Vol. 20, pp. 4279:8-12, 4280:18.

did or did not require since in any event Saint Alphonsus had a general duty to ensure radiology coverage to MRI Center on favorable terms, *id.* at 63-65; and that other isolated contract language and the "beliefs" of certain people render the contract ambiguous, including a never-previously-mentioned theory of latent ambiguity, *id.* at 65-68.

MRIA's lead substantive argument that the contract's correct construction makes no difference, MRIA Br. 63-65, is remarkable in view of the extraordinary emphasis that MRIA placed, during the trial, on the Hospital's supposed contractual right to compel the radiologists to provide 24/7 coverage to Center's outpatients. MRIA did so because, if believed, this assertion could transform simple inaction by Saint Alphonsus into a breach of a fiduciary duty to curtail IMI's vigorous, independent competitive conduct. Nevertheless, MRIA now says that the correct understanding of the contract does not matter, because there was another, informal oral understanding between MRIA and all of the hospitals it served that the hospitals would provide full radiologist coverage to MRIA. MRIA Br. 64. Thus, it claims, even if the Hospital's reading of the contract is correct, Saint Alphonsus nonetheless "breached its fiduciary duty by entering into deficient agreements in the first place." MRIA Br. 64. "Either way, the result is the same—St. Al's deliberately left its partners high and dry." *Id.* And, even absent such a contract right, "the jury could reasonably conclude that St. Al's had the ability to oblige GSR to read [for Center outpatients on a 24/7 basis]" by "leverage" and intimidation, and violated its fiduciary duty when it "chose not to do so." *Id.* at 65.

MRIA cannot so easily escape from the fact that it placed enormous emphasis on the Hospital's supposed unexercised contractual right to force the radiologists to serve MRIA Center

outpatients on a 24/7 basis. There is every reason to believe, as MRIA obviously did when it adopted this strategy, that it would be highly persuasive to the jury. That fact, coupled with the sketchy nature of the alternative theory of fiduciary breach by inaction presented here—which was not seriously pressed at trial—shows why the plain meaning of the contract, and the trial court's refusal to enforce it, was a matter of substantial consequence. Contrary to MRIA's claim, MRIA Br. 69, the court's error was highly prejudicial.

MRIA leads off its contract ambiguity argument with the mistaken claim that the trial court's determination of contract ambiguity is reviewed under a "deferential" standard for substantial evidence. MRIA Br. 63. To the contrary, both the issue "whether an instrument is ambiguous" and "[i]nterpretation of an unambiguous document" are "question[s] of law" over which this Court exercises "free review." *C & G, Inc. v. Rule*, 135 Idaho 763, 765, 25 P.3d 76, 78 (2001). Thus, no deference is owed to the trial judge's finding of ambiguity and resulting refusal to construe the contract.

In trying to show that the contract was ambiguous, MRIA first recites the trial court's reasoning that because the contract obligated the radiologists to provide MRI services (among others), and because the only MRI magnet at the Hospital was located in MRI Center, the contract must have contemplated that "services at Center were ... intended to be included," lest that obligation "be rendered meaningless." MRIA Br. 66. MRIA now terms this a "latent ambiguity," and thereby seeks to use extrinsic evidence to argue its case even if the contract is clear and unambiguous on its face. MRIA Br. 68; *see also Knipe Land Co. v. Robertson*, 151

Idaho 449, 455 259 P.3d 595, 601 (2011) ("latent ambiguity exists where an instrument is clear on its face, but loses that clarity when applied to the facts as they exist").[22]

But the radiologists' contractual duty to provide MRI services is not meaningless under Saint Alphonsus's reading of the contract (and hence there is no latent ambiguity here) for two reasons. First, it is undisputed that GSR's contractual duty involves the "professional" aspect of "doctors reading and interpreting the images," not the "technical aspect" of "MRI scanning equipment and technicians." MRIA Br. 4-5; Tr., Vol. 2, p. 29:20-30:12. Since most of these professional services are performed separate from the imaging equipment, they can be provided to the Medical Center even if the Medical Center does not include an MRI scanner. Second, the duty has meaning under any reading of the contract because the radiologists are in all events obligated to provide MRI services to *Hospital* patients. Of course, this duty in no way implies the *further* obligation to provide those services for *other* patients also scanned at MRI Center.

MRIA also attempts to cobble together a different ambiguity argument from fragments of the 2001 services contract. MRIA Br. 66. It first notes general language recognizing that the Hospital operates a "Department of Radiology" that is "located on the first floor of the Medical Center," and serves inpatients and outpatients. Ex. 4229 p. 4 ¶ C. Since MRI Center is, like the Hospital's own radiology modalities, located on the first floor, MRIA infers without any basis

[22] MRIA never raised the latent ambiguity argument below, but rather argued that the plain language of the contract itself required Saint Alphonsus to provide MRIA with radiologists. R. 2914-19; *see also* R. 4076 (same in opposition to JNOV). In accordance with this "Court's longstanding rule," MRIA is not entitled to have "consider[ed] issues raised for the first time on appeal." *KEB Enters., L.P. v. Smedley*, 140 Idaho 746, 752, 101 P.3d 690, 696 (2004).

that Center must in fact be the Hospital's "Department of Radiology." MRIA Br. 66.[23] To that false premise it then links contract language several pages later, Ex. 4229 § 1.3.2, which obligates GSR to provide "a sufficient number of Radiologists ... in the Department or on call to assure complete and timely" 24/7 coverage. MRIA Br. 66-67. Based on this illogical syllogism, MRIA thus draws the unsound conclusion that the contract obligates the radiologists to serve the needs of MRI outpatients treated at MRI Center. This conclusion rests on no logical reasoning—it is also wrong on its face because, under the plain language that MRIA elects not to discuss, the contract's duties are owed to "the Medical Center," which is unambiguously the Hospital and expressly does not include MRI Center.[24]

Nor, finally, is the argument for ambiguity aided by MRIA's distorted claims that certain people believed that the contract required services to MRI Center outpatients. MRIA Br. 67. Such extraneous evidence is wholly irrelevant when the contract language is clear. *See, e.g.*,

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[23] MRIA also claims that former CEO Chris Anton "testified that, from its formation, Center was considered one and the same as"—actually "part of the 'Saint Alphonsus radiology department.'" MRIA Br. 5, 67. But no such testimony was admitted into evidence. Instead, Anton testified that Center was located "near" and "at the back end of the radiology department," "contiguous to the hospital," and that Hospital patients used it. Tr., Vol. 18, pp. 3800:9-17, 3801:8-9.

[24] MRIA also finds supposed ambiguity in language from the 1997 agreement, which states that the radiologists "shall perform all services generally and customarily performed by the Medical Center hospital-based radiologists group." MRIA Br. 66; Ex. 4033, at 2. But that is the first sentence of an entire section entitled "Description of Physician Services and Duties," and introduces an extended discussion of the types of services required to be performed, not of the parties to whom the obligations are owed. In any event, the 1997 agreement was superseded by the 2001 agreement and was no longer controlling on the parties' conduct at the times relevant to whether the Hospital could have breached fiduciary duty by inaction.

Swanson v. Beco Constr. Co., 145 Idaho 59, 63-64, 175 P.3d 748, 752-53 (2007); SA Br. 52 (citing other authorities).[25]

C. The Court's Multiple Evidentiary Errors, Which MRIA Scarcely Defends on Appeal, Improperly Helped MRIA Paint Saint Alphonsus as Profit-Obsessed and Dishonest

As set forth in the opening brief, the trial court both admitted substantial inadmissible evidence and improperly excluded evidence rebutting MRIA's claims that Saint Alphonsus was profit-obsessed and acted in bad faith. SA Br. 53-58.

First, the trial court's exclusion of Cindy Schamp's testimony regarding her conversations with MRIA's then-CEO Roger Curran was highly prejudicial. While the trial court later acknowledged that the exclusion was error, R. 4697-98, MRIA still seems to believe that the hearsay rule barred Ms. Schamp from testifying about her prior statements to Curran. MRIA Br. 69-70. But a party's live, in-court testimony, subject to cross-examination, regarding her present recollection of past events is not hearsay. *See* SA Br. 55 & n.22 (citing multiple authorities).[26] And the proffered testimony here about Schamp's own prior conversations was not offered to prove the truth of the statements she made, but simply the fact that she made them,

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[25] Beyond that, two of those alleged believers were Drs. Giles and Prochaska, themselves biased principals in MRIA itself. Further, as shown above, the alleged concurrence in that view by Saint Alphonsus own employees misstates what those witnesses actually said. *See supra* n.21. And the cited testimony of Jeff Cliff, Tr., Vol. 15, pp. 2956-2957, said nothing about owing any obligation to serve Center outpatients, only that—as no one disputes—the GSR doctors sometimes used MRI Center's facilities in meeting the radiological needs of Hospital patients.

[26] The only authority MRIA cites to the contrary, *State v. Parmer*, 147 Idaho 210, 223-24, 207 P.3d 186, 199-200 (Ct. App. 2009), is inapposite. There, a criminal defendant was not himself testifying, but sought to either play a recording of, or have a third party recount, his prior out-of-court statements to prove their truth. *See id.* That is a far cry from the present situation.

to rebut MRIA's repeated contentions that Saint Alphonsus kept secret from MRIA its negotiations with GSR. *See* SA Br. 54 n.21 (citing multiple transcript pages making this claim).

While MRIA does not contest the relevance of her statements to Saint Alphonsus's defense, it argues that there was no prejudice because Cindy Schamp did, in fact, get to testify about the content of the statements. MRIA Br. 70 (citing numerous transcript pages). But MRIA's proffered transcript cites actually show that, in each instance, Ms. Schamp was only allowed to discuss the generic fact of conversations, or the statements made by MRIA officials (which would themselves not be hearsay as party-opponent statements). She was not allowed to recount what she said to the MRIA representatives. Indeed, in one of MRIA's proffered cites, MRIA *objected* on grounds that Schamp was offering hearsay, and the Court only allowed it because "[counsel] just asked her what she could tell us with regard to who she spoke to, *not what was said*." Tr., Vol. 12, pp. 2356:14-2357:5 (emphasis added). Given MRIA's repeated allegations of secrecy, and the key importance of what Cindy Schamp said to MRIA's principals regarding the ongoing negotiations, the exclusion of her testimony was not harmless but rather went to the very heart of whether Saint Alphonsus breached its duty of loyalty to MRIA.

Second, bearing on the same topic of Saint Alphonsus's alleged concealment, the trial court also erroneously excluded business records of attorney Carl Harder, which unambiguously showed that he was counsel to GSR in its negotiations with the Hospital at the very same time

that he represented MRIA on a range of other matters.[27] The court excluded the records from evidence because Mr. Harder had died prior to trial and thus could not be subject to examination on the issue. Hr'g Tr., p. 56:12-25 (Sept. 2, 2011). But the admissibility of a business record is governed by Idaho Rule of Evidence 803(6), titled "Availability of [the] Declarant Immaterial," and does not turn on whether or not its creator is alive at the time of trial. SA Br. 57-58.

MRIA does not dispute this, but instead argues only that the trial court's ruling should be upheld because it was "discretionary." MRIA Br. 73. But a court abuses its discretion when its decision is underpinned by an incorrect legal standard. *See, e.g.*, *State v. Watkins*, 148 Idaho 418, 427, 224 P.3d 485, 494 (2009) (holding that trial court "abused its judicial discretion ... because [it] failed to act consistently with the applicable legal standards provided by the rules of evidence" in ruling on admissibility of alleged hearsay). And that exclusion was highly prejudicial because, in the face of MRIA's unending assertions that, for several years, Saint Alphonsus concealed from MRIA the fact that it was negotiating with GSR to partner in the non-MRI side of IMI, these business records powerfully show that those ostensibly secret negotiations were in fact being conducted with MRIA's own lawyer acting as counsel to GSR.

Third, again bearing on the issue of the Hospital's supposed concealment, MRIA offers no justification for the trial court's inexplicable decision to prevent Saint Alphonsus from cross-examining Dr. Prochaska with an article from the *Idaho Business Review* (Ex. 782) that revealed

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[27] Indeed, in rejecting MRIA's request to amend its complaint to add a punitive damages claim against GSR prior to the first trial, Judge McLaughlin relied upon the fact that "Carl Harder represented both Gem State Radiology and Doctors Magnetic Resonance and MRIA" in concluding that "there was nothing about the action by Gem State Radiology [regarding IMI's creation] that was surreptitious or undisclosed." 2007 R., Vol. V, p. 856.

the Hospital's 2001 partnership in the non-MRI activities of IMI. MRIA Br. 72-73. The article was self-authenticating under Rule 902 and thus, per the rule itself, "[e]xtrinsic evidence of authenticity as a condition precedent to admissibility [was] not required" for its use. The article also was relevant, because it directly contradicted Dr. Prochaska's self-serving statement on direct that Saint Alphonsus kept its involvement with IMI a secret. And it was not excludable as hearsay, because it was being used for the non-hearsay purpose of showing that the partnership was in fact publicly disclosed. SA Br. 56 (citing *Idaho Trial Handbook* § 21.1 (2005)).

MRIA quibbles that Saint Alphonsus "solely complains" that the document was excluded as hearsay, when in fact Judge Wetherell "kept it out on foundational grounds instead." MRIA Br. 72. That is not so. "Foundation" involves "demonstrat[ing] [a] document's authenticity and relevance," *Newman v. State*, 149 Idaho 225, 227, 233 P.3d 156, 158 (Ct. App. 2010), and the Hospital has always argued that the *Idaho Business Review* article was self-authenticating, relevant, and not hearsay, SA Br. 56. Thus, it should have been admitted to impeach Dr. Prochaska, and not kept from the jury's eyes for seven weeks, until it was admitted without objection when the jury heard testimony from Dr. Seabourne, who was quoted within it. Tr., Vol. 24, p. 5337:10-19. It was therefore prejudicial error for the court to exclude the document and allow Dr. Prochaska's false assertions to go unchallenged for almost two months of trial.

Fourth, MRIA appears to argue that the exclusion of the Arid Club conversations was proper because the evidence would have been irrelevant. MRIA Br. 70-71. But given MRIA's framing of the central issue in the case as who destroyed the "happy family" of MRIA (*e.g.*, Tr., Vol. 10, pp. 1572:25-1573:7), Dr. Giles's early 1999 request that Hospital COO Schamp spy on

her CEO and report back to him was obviously relevant. It created a well-justified cloud of distrust before IMI even opened. 2007 Tr., pp. 3409:17-3416:16. In any event, the relevance and admissibility of that testimony was binding under the trial court's law-of-the-case ruling, SA Br. 9, since it was admitted over MRIA's objection at the first trial, and MRIA did not appeal from that ruling during the first appeal. *See* SA Br. 56; *Taylor*, 146 Idaho at 709, 201 P.3d at 1286 (law-of-the-case doctrine "prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.").

Fifth, the trial court erroneously admitted testimony of Dr. Giles, an MRIA principal, that someone else reported to him a statement by Cindy Schamp that the "cheapest thing" for the Hospital to do was to simply wait while MRI Center declined in value. SA Br. 53 n.19. Giles allegedly recorded this hearsay statement on a piece of paper at the time it was relayed to him by Jeff Cliff, and the court correctly excluded that document (Ex. 4154) as hearsay. R. 2082. But after Cliff testified that he could not recall either Schamp's statement or telling Giles about it, Tr., Vol. 15, pp. 2916:13-2917:14, the trial court allowed Giles to tell the jury the full extent of what Cliff supposedly told him in order to impeach Cliff's lack of recall. Tr., Vol. 21, pp. 4411:19-4413:13.[28] As Saint Alphonsus pointed out in recording its objection before the testimony came

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[28] Giles thus testified as follows:

> Q: Dr. Giles, did Mr. Cliff ever inform you of a conversation that he had with Cindy Schamp, wherein Ms. Schamp told Cliff that the cheapest thing for the hospital to do in the negotiations was to wait?
>
> A: Yes.

in, the impeachment value relating to Cliff's non-denial/inability-to-remember was minimal, and was clearly outweighed by the risk that the testimony "will be taken as proof that ... Cindy Schamp must have" made the "inflammatory statement." Tr., Vol. 21, pp. 4410:8-4411:18.

Now, in this Court, MRIA invokes this "impeachment" evidence for the precise improper purpose that the Hospital warned against. For MRIA now claims that the Saint Alphonsus "confirmed internally that the cheapest option was [for the Hospital] to wait for MRIA to lose most of its business" before buying it at a discount or dissociating. MRIA Br. 12. And the only relevant authority it cites is Giles's testimony, which it relies upon in direct violation of the limiting instruction. *Id.*[29] Moreover, Giles's hearsay statement is the only record evidence known to the Hospital referencing this "cheapest" option statement. The jury very likely drew from it the same impermissible inference the MRIA now directly urges on this Court—that COO Schamp actually made the statement.

Sixth, MRIA gives no justification why the Hospital was foreclosed from referring to its legal status as a non-profit corporation, as was done throughout the first trial, *e.g.*, 2007 Tr., pp.

Tr. 4418:3-8. The court then immediately repeated the entire statement, including the prejudicial hearsay:

> [Y]ou have heard testimony that Mr. Jeff Cliff advised Dr. Giles he had been told by Cindy Schamp the cheapest thing the hospital could do in negotiations with MRIA was to wait.

Tr. 4418:12-16. This statement, the court advised, may be considered by you "only to determine what weight you attach to the prior testimony of Mr. Jeff Cliff on this subject," and not to "prove that Ms. Schamp actually made the statement." Tr. 4418:17-23.

[29] MRIA's brief (at 12) cites to Giles's statement at Tr., Vol. 21, p. 4418:3-8. Its other appended citations provide no support whatsoever for the claimed statement. *See* Tr., Vol. 9, pp. 1430:25-1435:8 (Sandra Bruce denying ethical propriety of a partner "dragging its feet"); Tr., Vol. 15, pp. 2916:13-2917:14 (Cliff's testimony about lack of recollection).

932:6-11, 4080:20-24. That term describes a widely understood category of corporations in our society that function under special tax rules, including constraints on personal compensation and certain expenditures. The Hospital's decision to operate as a non-profit entity subject to those constraints is a basic fact of who it is, and it is relevant in the context of MRIA's allegations of an improper financial motivation. Even apart from its relevance, since the term was used freely at the first trial without objection or challenge, its admissibility is law of the case under the ground rules the trial court established. SA Br. 9. Finally, MRIA's observation that some witnesses slipped and used the term notwithstanding the court's ruling does not make the ruling any more correct or eliminate all prejudice that flowed from this senseless limitation on Saint Alphonsus's legal defense.

III. MRIA DOES NOT DISPUTE THAT THE CLAIMS OF CENTER AND MOBILE ARE TIME BARRED, AND SAINT ALPHONSUS THEREFORE IS ENTITLED TO JUDGMENT ON THESE CLAIMS

Saint Alphonsus established in its opening brief (at 58-59) that the Hospital is entitled to judgment on the claims of Center and Mobile because those claims are time barred, and because, under the two-part test of this Court's ruling in *Tingley v. Harrison*, 125 Idaho 86, 91-92, 867 P.2d 960, 965-66 (1994), the statute of limitations cannot be avoided through application of the "relation back" doctrine of IRCP Rules 15(c) and 17. MRIA cannot and does not deny that the claims are time barred if they do not relate back, nor does MRIA discuss the relation-back doctrine or this Court's controlling decision in *Tingley*.

MRIA instead incorrectly asserts that the Hospital's statute-of-limitations arguments are "irrelevant" if permitting the joinder of Center and Mobile was *otherwise* a proper exercise of the

trial court's discretion. MRIA Br. 74. MRIA has it backwards. The trial court's decision allowing MRIA to amend its counterclaims to join Center and Mobile was improper precisely *because* the claims of those entities were time barred. *See, e.g., Terra-West, Inc. v. Idaho Mut. Trust, LLC*, 150 Idaho 393, 396, 401, 247 P.3d 620, 623, 628 (2011) (whether district court abused its discretion in granting motion for leave to amend turns on whether the new claim was time barred); *Winn v. Campbell*, 145 Idaho 727, 730, 184 P.3d 852, 855 (2008) ("district court properly denied the motion to amend" because the plaintiff's "amendment could not have related back" under IRCP 15(c) and hence was time barred).[30] And, in any event, the statute-of-limitations defense is an independent basis for judgment in favor of Saint Alphonsus on these claims, as Saint Alphonsus urged in its opening brief, *see* SA Br. 58 (Heading III) ("Saint Alphonsus is entitled to judgment on the claims of Center and Mobile because ... their claims are time barred" (capital lettering removed)), and in the court below, *see* R. 321-26, 3886-87. *See also, e.g., Watts v. Lynn*, 125 Idaho 341, 870 P.2d 1300 (1994) (judgment for defendant where amended complaint, filed outside the limitations period, did not relate back to initial complaint).

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[30] *Accord Shapley v. Centurion Life Ins. Co.*, -- Idaho --, 303 P.3d 234, 241 (2013) (denial of motion to amend appropriate where claim sought to be added was "futile"); *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 346, 33 P.3d 816, 820 (2001) ("factors this Court considers when reviewing a trial court's decision to grant a motion to amend include ... if the opposing party has an available defense such as the statute of limitations"); *Black Canyon Racquetball Club, Inc., v. Idaho First Nat'l Bank N.A.*, 119 Idaho 171, 175, 804 P.2d 900, 904 (1991) ("[i]n determining whether an amended complaint should be allowed ... the court may consider whether the new claims proposed to be inserted into the action by the amended complaint state a valid claim"); *Mitchell v. Flandro*, 95 Idaho 228, 234, 506 P.2d 455, 461 (1972) (trial court properly refused to permit amendment of complaint to add new claim where statute of limitations had run on that claim).

Thus, Center and Mobile may recover in this lawsuit only if they can avoid the undisputed time bar by having their claims relate back to MRIA's earlier pleadings.[31] But *Tingley*, which MRIA ignores, permits relation back in the face of a statute of limitations only where there was "difficult[y]" in "determin[ing]the right party to sue" such that there was an "inadvertent" or "understandable mistake" concerning identity (and, even then, only if a correction is made within a "reasonable" time after objection). 125 Idaho at 92, 867 P.2d at 966. Here, there is no case of mistaken identity, given that MRIA obviously knew that Center and Mobile were the entities that possessed the claims that MRIA was asserting "on [their] behalf." *See Wells v. HBO & Co.*, 813 F. Supp. 1561, 1567 (N.D. Ga. 1992) ("even the most liberal interpretation of 'mistake' cannot include a deliberate decision not to [name] a party whose identity plaintiff knew from the outset"). And rather than add Center and Mobile as parties within a reasonable time after Saint Alphonsus objected to MRIA's assertion of their claims, MRIA strenuously resisted doing so for three years, far longer than the one-year delay held "not 'reasonable'" in *Tingley*. 125 Idaho at 91-92, 867 P.2d at 965-66.[32]

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[31] Whether those claims relate back or are time barred is a question of law subject to free review, and the district court necessarily abused its discretion if it answered that question incorrectly. *See Suitts v. First Sec. Bank*, 110 Idaho 15, 23, 713 P.2d 1374, 1382 (1985).

[32] Contrary to MRIA's suggestion, Saint Alphonsus never contended that MRIA acted in bad faith with respect to Center and Mobile or had "nefarious intentions" in excluding them from the original lawsuit. MRIA Br. 76 n.47. MRIA simply chose to resist the joinder of Center and Mobile as parties on legal grounds that proved to be incorrect. Proceeding in this manner provided several benefits to MRIA at the first trial, including, most obviously, an award to MRIA of their damages. *See* SA Br. 59 n.24. Notably, while MRIA denies that it was motivated by these advantages, it never claims (as *Tingley* requires) that its decision was caused by mistaken identity.

Failing to address the relevant factors, MRIA instead cites *Hayward v. Valley Vista Care* for the proposition that joinder of Center and Mobile as new parties was proper because MRIA acted in good faith and Saint Alphonsus suffered no prejudice. MRIA Br. 75. But, contrary to MRIA's description of the case, *Hayward* did not involve the joinder of any new parties. Rather the *Hayward* plaintiff was "merely ... changing the representative capacity in which the suit is being brought," a scenario that this Court thought called for "a more lenient standard" of relation back. 136 Idaho 342, 349, 33 P.3d 816, 823 (2001). Indeed, Justice Eismann emphasized in a separate opinion that "[t]he facts in this case do not raise any issue regarding substitution of the real party in interest" because "[t]he proposed second amended complaint would not have changed the named plaintiff, nor is there any need to do so." *Id.* at 353, 33 P.3d at 827 (Eismann, J., specially concurring). Here, by contrast, this Court's prior opinion makes clear that MRIA may not assert Center's and Mobile's claims in a representative capacity, but rather must join Center and Mobile as additional parties. *SADC*, 148 Idaho at 497, 224 P.3d at 1086. This case is therefore controlled by *Tingley*, involving the joinder of new claimants, and not by *Hayward*, involving a change in the capacity of the original claimant. And, under *Tingley*, the good or bad faith of a plaintiff's decision about joinder is not the governing test of relation back.

Likewise, *Tingley* does not require a party to demonstrate prejudice where, as here, either or both other factors—unreasonable delay and lack of mistake as to party identity—are present. *Tingley*, 125 Idaho at 92, 867 P.2d at 966 (Johnson, J., concurring and dissenting) ("[i]n this case, the Court makes no reference to prejudice to [the defendant], nor is there any evidence of prejudice"). There is good reason for this rule, since allowing new parties to assert time-barred

claims is inherently prejudicial. In this case, for instance, Center and Mobile were awarded substantial damages that, under this Court's prior decision, were not recoverable by MRIA.

MRIA also seeks to rely on *Conda Partnership*, a court of appeals decision pre-dating *Tingley* that reversed a district court's decision to deny a plaintiff's motion to amend its pleading to add or substitute a real party in interest. *See Conda P'ship, Inc. v. M.D. Constr. Co.*, 115 Idaho 902, 904, 771 P.2d 920, 922 (Ct. App. 1989) (per curiam). While this Court's subsequent decision in *Tingley* would obviously control in the event of any tension with the court of appeals' decision in *Conda*, the two cases are in fact fully consistent. Critically, in *Conda*, the attempted joinder of the real party in interest appears to have occurred within the relevant limitations period, since the court of appeals emphasized that "[t]he district court did not rely on any statute of limitation in granting summary judgment." *Id.* at 903, 771 P.2d at 921. *Conda* thus has little bearing on cases like *Tingley* and this one in which a party is seeking to rely on the doctrine of relation back in order to assert claims that would otherwise be barred by the statute of limitations.

Finally, in addition to improperly allowing Center and Mobile to recover on time-barred claims, the trial court abused its discretion in permitting joinder because (i) doing so was inconsistent with the trial court's own law-of-the-case ruling, and (ii) this exercise of discretion was based on an error of law, namely, the court's misapprehension that this Court's prior decision *required* the joinder. SA Br. 60; *see also State v. Stevens*, 146 Idaho 139, 144, 191 P.3d 217, 222 (2008) ("[a]n abuse of discretion will be found ... if the trial court does not correctly apply the law"). MRIA offers no response to this argument.

IV. SAINT ALPHONSUS IS ENTITLED TO PRO RATA APPORTIONMENT OF ALL OF MRIA'S CLAIMS FOLLOWING ITS SETTLEMENT WITH ALLEGED CO-CONSPIRATOR GSR

Saint Alphonsus demonstrated in its opening brief that the trial court misapplied the apportionment statute in three respects: by failing to apply it at all to MRIA's contract claims; by allowing separate, inconsistent apportionments for each of MRIA's claims; and by submitting the question of relative fault to the jury, rather than applying an "equal shares" approach to "pro rata" apportionment. SA Br. 61-64. MRIA's responses to these arguments are unpersuasive.

On the first point, MRIA's response is to make facile word play, claiming that Saint Alphonsus is "[o]bviously" wrong because the statute refers to "tortfeasor" and not "contract claims." MRIA Br. 77-78. It shrugs off the contrary authority as "no[t] legitimate," and says incorrectly that one authority "simply does not exist in the cited section." *Id.* at 77-78 & n.48. MRIA is wrong in all respects.

Idaho Code § 6-803(1) creates a "right of contribution ... among joint tortfeasors," with the term "joint tortfeasor" defined as "one of two or more persons jointly or severally liable in tort for the same injury to person or property," *id.* § 6-803(4). Saint Alphonsus is entitled to a *pro rata* reduction of damages from released tortfeasors. *Id.* § 6-806 The *only* relevant question, then, is whether GSR and Saint Alphonsus were "jointly or severally liable *in tort*" for the alleged breach of contract. And because MRIA alleged a conspiracy between Saint Alphonsus and GSR to breach the contract, they were. *See* SA Br. 61-62; 44B Am. Jur. 2d *Interference* § 55 ("[a]ll persons who united to induce a breach of contract are jointly and severally liable for the damages to the party injured thereby," with a "party to the contract who breaches it ... liable for

the interference as a *joint tortfeasor*" (emphasis added)).[33] The allegedly nonexistent authority does exist (and is attached as an addendum to this brief), and likewise states that a conspiracy to breach a contract "sounds in tort, not contract." 15A C.J.S. *Conspiracy* § 24 (2002).[34]

This rule is sensible and fair in cases like this one, where a plaintiff alleges a joint course of misconduct that inflicted a single, undifferentiated injury in violation of both tort and contract duties. To permit apportionment of the compensatory damages for the purpose of some legal theories but not others would render meaningless the defendant's right to have apportionment, since the plaintiff could always rely on the contractual duty to support an alternative award of unapportioned damages. And it would create a windfall for the plaintiff, who will already have obtained a settlement from the settling defendants by threatening joint and several liability for all claims, including the contract claim.

None of the cases MRIA cites are to the contrary. Most involve no issue at all about whether alleged conspirators to breach a contract are joint tortfeasors.[35] The single exception is

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[33] MRIA selectively quotes language from *Am. Jur.* stating that contract claims against a breaching party sound in contract, but ignores that the very next sentence makes clear that the contract-breaching party is nonetheless treated "as a joint tortfeasor." *Id.*

[34] MRIA says it could not find this language anywhere it looked, but the updated version of *C.J.S.* available on Westlaw (also attached) makes the very same point, in a renumbered section: "A cause of action for a conspiracy, which results in the commission of a wrong, sounds in tort although the acts constituting the wrong may affect a contractual relationship." 15A C.J.S. *Conspiracy* § 25 (database updated September 2013).

[35] *See CTTI Priesmeyer, Inc. v. K&O L.P.*, 164 S.W.3d 675, 685 (Tx. Ct. App. 2005) (rejecting contribution where the *settling* parties from whom contribution was sought were not tortfeasors, but rather only breached contracts, with no issue of conspiracy in the case); *Fid. & Deposit Co. v. Bondwriter Sw., Inc.*, 263 P.3d 633, 636 (Ariz. Ct. App. 2011) (no claim of conspiracy or joint tortious behavior; indeed, plaintiff did not sue anyone but defendant itself);

In re Singh, 457 B.R. 790, 805-06 (E.D. Cal. 2011), where the bankruptcy court did not reach the issue because the plaintiff's "nonspecific" and "boilerplate" allegations of conspiracy against unnamed defendants failed to state a claim. MRIA thus cites *no case* that refutes the principle that an allegation of conspiracy to breach a contract results in joint and several tort liability for the contract breach damages.

MRIA next contends that there was no error in allowing the jury to apportion fault separately for each claim. MRIA Br. 79. But the jury's findings are inconsistent because the conspiracy count was not an "entirely different claim[] with different elements," *id*, but rather was entirely derivative of the other counts. MRIA appears to recognize as much by arguing that the trial court appropriately corrected the error by decreasing the apportionment on the tortuous interference claim to match that of the conspiracy count. But the trial court had no warrant for executing only a partial fix or for choosing the interference claim over the fiduciary duty claim as the sole count requiring correction. MRIA's speculation, *id.*, and that of the trial court, R. 4693, that the jury might have rejected the idea that the Hospital and GSR were joint tortfeasors, is no answer. Rather, for apportionment purposes, that "determination ... must be based on the pleadings," *Quick v. Crane*, 111 Idaho 759, 783, 727 P.2d 1187, 1211 (1986), which did allege concerted conduct, *see* R. 103-04, 111 ¶¶ 57-58, 99.

D.R. Horton, Inc.—Denver v. Travelers Indem. Co., 281 F.R.D. 627, 629 (D. Colo. 2012) (same); *Dameshek v. Encompass Ins. Co.*, No. 1:11-cv-18, 2011 WL 3627384, at *2 (M.D. Pa. Aug. 17, 2011) (same); *Cooper Indus., Inc. v. Tarmac Roofing Sys., Inc.*, 276 F.3d 704, 707 (5th Cir. 2002) (involving no conspiracy allegations). The only Idaho authority cited by MRIA, *Just's, Inc. v. Arrington Construction*, 99 Idaho 462, 583 P.2d 997 (1978) has nothing to do whatsoever with apportionment of fault.

Finally, with respect to the proper interpretation of "pro rata" shares, MRIA cites cases from two jurisdictions (Oklahoma and Rhode Island) that appear to have interpreted "pro rata" the way MRIA prefers. But MRIA's preferred reading is not the majority view, as made clear by the many authorities cited in Saint Alphonsus's opening brief—including the two leading torts treatises—explaining that for apportionment purposes, "pro rata" traditionally means equal shares. *See* SA Br. 63-64. Courts in numerous states have adopted this definition of "pro rata share" in construing their own versions of the Contribution Among Tortfeasors Act.[36] Indeed, when Idaho adopted its statute, the rule that "the tortfeasors who are liable will end by paying equal shares"—known as "pro-rata contribution"—was "still followed by a majority of the courts." *Restatement (Second) of Torts* § 886A cmt. h (1979). MRIA does not address, or refute, this majority view of the meaning of the term "pro rata" shares.

MRIA also fails to address the official comments to the uniform act from which the Idaho Code provisions are derived, which make clear that the "equal shares" approach applies in the absence of an optional subsection permitting a determination of relative degrees of fault. SA Br. 63-64 & addendum. It also ignores the fact that the Idaho Code once contained this optional subsection, mandating the outcome MRIA now seeks, but that in 1987, at the same time it replaced joint-and-several liability with comparative fault in negligence actions, the Legislature

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[36] *E.g.*, *Zeller v. Cantu*, 478 N.E.2d 930, 933 (Mass. 1985) (act "bars any consideration of the relative fault of a codefendant in assessing his or her pro rata share of the damages"); *Great W. Cas. Co. v. Fletcher*, 287 S.E.2d 429, 431 (N.C. App. 1982) ("the pro rata share of each defendant is determined by dividing the amount of the judgment by the number of persons against whom it has been obtained"); *Lincenberg v. Issen*, 318 So.2d 386, 393 (Fla. 1975) ("contribution [is] on a pro rata basis [and] relative degrees of fault [are] not to be considered").

deleted the optional subsection. *Id.* This demonstrates that the Legislature intended the "equal shares" rule to apply in the few remaining instances of joint-and-several liability, of which this case is one. *See Reyes v. Kit Mfg. Co.*, 131 Idaho 239, 242, 953 P.2d 989, 992 (1998) (legislative "deletion" of statutory provision demonstrated that "the legislature intended to eliminate" effects of provision); *Hendrix v. Gold Ridge Mines, Inc.*, 56 Idaho 326, 337-38, 54 P.2d 254, 258 (1936) ("fact that ... provision was omitted from our statute leads to the conclusion that it was not intended that such practice should prevail here").

MRIA's failure to discuss this statutory history is especially problematic given MRIA's reliance on two cases in which this Court in dicta appeared to assume that the statute would require jury determinations of relative fault. MRIA Br. 81. It is critically important that *Quick v. Crane* was decided in 1986, the year before the Legislature deleted the provision of the statute that provided for relative degrees of fault to be considered. Similarly, *Burgess v. Salmon River Canal Co.*, 119 Idaho 299, 309, 805 P.2d 1223, 1233 (1991), appears to have likewise involved the pre-1987 version of the statute, since the Court referred to contribution for "relative negligence," MRIA Br. 81 (quoting *Burgess*), a cause of action that no longer existed after the Legislature's 1987 abolition of joint-and-several liability in negligence actions. Both of these cases thus dealt with the pre-1987 statute, before the critical provision was removed.

MRIA also contends that § 6-805(2) requires the question of comparative fault to be "presented to and considered by the finder of fact," MRIA Br. 80-81, but the cited provision applies only to situations involving multiple tortfeasors "who are *not* jointly and severally liable." Idaho Code § 6-805(2) (emphasis added). The provision applicable in this case, involving

defendants who *are* jointly and severally liable, contains no such requirement, *see* Idaho Code § 6-805(1), a distinction that further supports Saint Alphonsus's position that an "equal shares" approach is required here.[37]

Interpreting "pro rata shares" in the apportionment statute to mean "equal shares" is not only the better reading of the statute, but is also both sensible and fair. It is widely recognized that the "equal shares" rule "is simpler to administer," *Restatement (Second) of Torts* § 886A cmt. h, especially in the limited context in which contribution and set off are still relevant, *i.e.*, to alleged conspirators acting in concert. The concept of comparative fault is ill-suited to conspiracies, where multiple parties work together for the same result, and "all co-conspirators are equally responsible for the acts of others done in furtherance of the conspiracy" *United States v. Harris*, 701 F.2d 1095, 1102 (4th Cir. 1983). The intentional and cooperative nature of conspiracy thus renders each co-conspirator fully and equally liable for the harm done, which is also consistent with the Legislature's decision to retain joint-and-several liability in cases of alleged conspiracies. The "equal shares" allocation reflects this "equal responsibility" in a way that a jury's allocation of percentages of fault would not.[38] Accordingly, the Court should at

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[37] MRIA also points to the last sentence of § 6-806, which provides that "[t]his section" (protecting settling joint tortfeasors from contribution liability) "shall apply only if the issue of proportionate fault is litigated between joint tortfeasors in the same action." MRIA Br. 80. MRIA cites no authority interpreting this provision, which does not purport to define the required pro rata reduction, but instead appears to mean only that the joint tortfeasors must be sued together in the same lawsuit and/or that the matter of apportionment must be raised in the litigation. These conditions are obviously satisfied here.

[38] Similar considerations exist in the only other context where the act still applies, *i.e.*, where parties are principal and agent or master and servant. *See* Idaho Code § 6-803(3), (5).

least hold that MRIA's damages awards should all be reduced by a 50% pro rata reduction.[39]

V. SAINT ALPHONSUS IS ENTITLED TO INTEREST BASED ON THE FORMULA SET FORTH IN THE IDAHO PARTNERSHIP STATUTES

As set forth in the opening brief, Saint Alphonsus, as a departing partner, is entitled to the legal rate of interest "from the date of dissociation to the date of payment." Idaho Code § 53-3-701(b) & official cmt. 3; *see also id.* § 53-3-104(b) (specifying that interest is paid at legal rate); *id.* § 28-22-104(1) (providing legal rate of 12%); SA Br. 64. Saint Alphonsus is thus entitled to 12% interest on its departing partner share, from April 1, 2004 (the date that Saint Alphonsus dissociated from MRIA) until it is paid.

MRIA does not dispute that this is what the statute requires. *See* MRIA Br. 82. Its only response is that the statute does not apply, because the default statutory provision is displaced by Section 6.2 of the MRIA general partnership agreement. *Id.* But, as the trial court held prior to the first appeal, and as discussed more fully in Part I of Saint Alphonsus's Cross-Respondents' Brief ("SA Cross-Appeal Br."), Article 6.2 is applicable only if a partner withdraws from the partnership "under under the circumstances outlined in Article 6.1." 2007 R., Vol. XII, p. 2309-11. Here, Saint Alphonsus undisputedly did *not* withdraw under one of the four provisions of Section 6.1, but rather exercised an express statutory right to withdraw under RUPA. *See SADC*,

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[39] MRIA contends that determining what the statute means "would not end the inquiry" because Saint Alphonsus must also prove what the settling parties intended "pro rata" to mean. MRIA Br. 80 n.51. To the contrary, the statute applies if the settlement agreement, by its terms, "provides for a reduction, to the extent of the pro rata share" of the settling defendants. Idaho Code § 6-806. The settlement agreement here includes the required statutory language, R. 1206-07, thereby facially invoking the application of the statute.

148 Idaho at 486-89, 224 P.3d at 1075-78. Thus, because the Hospital did not withdraw under Section 6.1, the provisions of Section 6.2 limiting interest do not apply here.

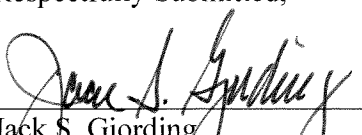
Further, not only is MRIA's argument incorrect as a matter of contract interpretation, it is also precluded by the law-of-the-case. Judge McLaughlin's holding that Section 6.2 of the contract applies *only* to Section 6.1 withdrawals was never appealed by MRIA following the first trial, despite the fact that this ruling meant that Saint Alphonsus would be entitled to a $4.6 million buyout rather than merely being awarded the value of its capital account. *See* SA Cross-Appeal Br. pp. 2-4. This legally binding interpretation of the scope of Section 6.2 precludes MRIA's argument that Section 6.2's interest limitations apply to a RUPA dissociation, and for that reason too, Saint Alphonsus should be awarded statutory interest on its buyout share, at the legal rate, running from April 1, 2004.

CONCLUSION

For the reasons stated herein and in Appellants' Brief, the Court should enter judgment for Saint Alphonsus as set forth at pages 65-66 of Appellants' Brief.

Dated: September 23, 2013

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 23day of September 2013, two true and correct copies of the foregoing APPELLANTS' REPLY BRIEF was served upon the following counsel for Respondents by hand delivery:

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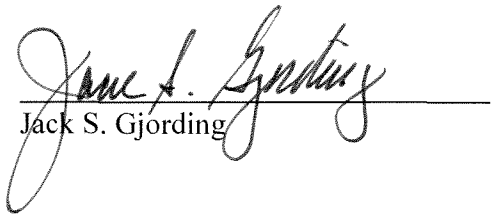

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Addendum

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A CONTEMPORARY STATEMENT OF

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ability for subsequent conspiratorial acts, the withdrawing conspirator remains liable for his or her previous agreement and all damages inflicted by acts he or she committed prior to the withdrawal.

Research References

West's Key Number Digest, Conspiracy ⇐12, 13

Although the withdrawal of a conspirator from a conspiracy marks his or her disavowal or abandonment of the conspiratorial agreement,[1] and he or she may avoid liability for subsequent conspiratorial acts,[2] the withdrawing conspirator remains liable for his or her previous agreement and all damages inflicted by acts he or she committed prior to the withdrawal.[3]

To terminate one's liability for a conspiracy, the conspirator must take affirmative steps, inconsistent with the objects of the conspiracy, to disavow or to defeat the conspiratorial objectives,[4] and the break with the other conspirators must be both clean and permanent.[5] Merely ceasing to participate in the ongoing activity of the conspiracy is not enough.[6]

D. ACTIONS IN GENERAL

1. General Considerations

§ 24 Generally

The gist or gravamen of a civil cause of action is not the conspiracy itself, but is the tort or civil wrong which is done under the conspiracy, and which results in damage to the plaintiff.

Research References

West's Key Number Digest, Conspiracy ⇐15 to 22

A cause of action for a conspiracy, which results in the commission of a wrong, sounds in tort,[1] and not in contract, although the acts constituting the wrong may affect a contractual relationship.[2] A statute providing that conspirators in specified instances shall be punished by fine or imprisonment does not create a cause of action for civil conspiracy.[3]

Unlike a criminal conspiracy, a civil conspiracy is not a separate tort action.[4]

There is no such thing as a civil action for conspiracy;[5] the action is for damages caused by acts committed pursuant to a formed conspiracy rather than by the conspiracy itself.[6]

In other words, a civil conspiracy is not an independent cause of action; there must be an

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Lincoln Sav. and Loan Securities Litigation, 794 F. Supp. 1424, Fed. Sec. L. Rep. (CCH) ¶ 97005 (D. Ariz. 1992).

[Section 23]

[1]U.S.—Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823 (11th Cir. 1999), amended in part, 211 F.3d 1224 (11th Cir. 2000) and cert. denied, 529 U.S. 1130, 120 S. Ct. 2006, 146 L. Ed. 2d 956 (2000).

[2]U.S.—Pope v. Bond, 641 F. Supp. 489 (D.D.C. 1986).

Subsequent acts not binding on withdrawing conspirator

U.S.—Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823 (11th Cir. 1999), amended in part, 211 F.3d 1224 (11th Cir. 2000) and cert. denied, 529 U.S. 1130, 120 S. Ct. 2006, 146 L. Ed. 2d 956 (2000).

[3]U.S.—Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823 (11th Cir. 1999), amended in part, 211 F.3d 1224 (11th Cir. 2000) and cert. denied, 529 U.S. 1130, 120 S. Ct. 2006, 146 L. Ed. 2d 956 (2000).

[4]U.S.—Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823 (11th Cir. 1999), amended in part, 211 F.3d 1224 (11th Cir. 2000) and cert. denied, 529 U.S. 1130, 120 S. Ct. 2006, 146 L. Ed. 2d 956 (2000).

[5]U.S.—Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823 (11th Cir. 1999), amended in part, 211 F.3d 1224 (11th Cir. 2000) and cert. denied, 529 U.S. 1130, 120 S. Ct. 2006, 146 L. Ed. 2d 956 (2000).

[6]U.S.—Armco Steel Co., L.P. v. CSX Corp., 790 F. Supp. 311 (D.D.C. 1991).

[Section 24]

[1]Ill.—Year Investments, Inc. v. Joyce, 44 Ill. App. 2d 367, 195 N.E.2d 21 (2d Dist. 1963).

Mo.—Labor Discount Center, Inc. v. State Bank & Trust Co. of Wellston, 526 S.W.2d 407 (Mo. Ct. App. 1975).

Neb.—Frank H. Gibson, Inc. v. Omaha Coffee Co., 179 Neb. 169, 137 N.W.2d 701 (1965).

[2]U.S.—Simecek v. U. S. Nat. Bank of Omaha, 91 F.2d 214 (C.C.A. 8th Cir. 1937).

Wash.—Kietz v. Gold Point Mines, 5 Wash. 2d 224, 105 P.2d 71 (1940).

[3]Mass.—Mezullo v. Maletz, 331 Mass. 233, 118 N.E.2d 356 (1954).

[4]U.S.—Sebastian Intern., Inc. v. Russolillo, 162 F. Supp. 2d 1198 (C.D. Cal. 2001).

[5]U.S.—In re Reilly, 262 B.R. 197 (Bankr. D. Conn. 2001).

Independent cause of action for civil conspiracy not recognized

U.S.—Phoenix Canada Oil Co. Ltd. v. Texaco Inc., 560 F. Supp. 1372 (D. Del. 1983).

N.Y.—In re Kings County Tobacco Litigation, 187 Misc. 2d 409, 727 N.Y.S.2d 241 (Sup 2000).

[6]U.S.—In re Reilly, 262 B.R. 197 (Bankr. D. Conn. 2001).

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Conspiracy
James L. Buchwalter, J.D., and Lonnie E. Griffith, Jr., J.D.

I. Civil Liability
D. Actions for Civil Conspiracy
1. General Considerations

Topic Summary References Correlation Table

§ 25. Cause of action, generally

West's Key Number Digest

West's Key Number Digest, Conspiracy 15 to 22

The essence of a civil cause of action is not the conspiracy itself but the tort or civil wrong that is done under the conspiracy and that results in damages to the plaintiff.

A cause of action for a conspiracy, which results in the commission of a wrong, sounds in tort[FN1] although the acts constituting the wrong may affect a contractual relationship.[FN2] Civil conspiracy alone is not actionable, and only acts taken in furtherance of the conspiracy that cause some injury to plaintiff can be the basis of a civil-conspiracy claim.[FN3] There must be an underlying wrong on which the conspiracy claim is based.[FN4]

The action is for damages caused by acts committed pursuant to a formed conspiracy rather than by the conspiracy itself.[FN5] The actionable element is the tort that the conspirators agree to perpetrate and that they actually commit in whole or in part.[FN6]

When the conspiracy itself is the gist of the wrong, each combination is in itself actionable.[FN7] An action grounded in civil conspiracy is normally an action at law,[FN8] and may be actionable at law as an action on the case, for damages.[FN9]

Exhaustion of administrative remedies is not required where a tort claim for a conspiracy is distinct from an administrative proceeding.[FN10] Compliance with state administrative procedures is not a condition precedent to a suit under a federal statute dealing with a conspiracy to interfere with civil rights.[FN11]

CUMULATIVE SUPPLEMENT

Cases:

To prove a claim for civil conspiracy, one must show a combination of two or more persons to accomplish a purpose that is unlawful or oppressive or to accomplish some purpose, not in and of itself unlawful, oppressive, or immoral, by unlawful, oppressive, or immoral means, to the injury of another. Born v. Hosto & Buchan,

PLLC, 2010 Ark. 292, 372 S.W.3d 324 (2010).

[END OF SUPPLEMENT]

[FN1] Ill.—Year Investments, Inc. v. Joyce, 44 Ill. App. 2d 367, 195 N.E.2d 21 (2d Dist. 1963).

Mo.—Labor Discount Center, Inc. v. State Bank & Trust Co. of Wellston, 526 S.W.2d 407 (Mo. Ct. App. 1975).

Neb.—Frank H. Gibson, Inc. v. Omaha Coffee Co., 179 Neb. 169, 137 N.W.2d 701 (1965).

[FN2] U.S.—Simecek v. U. S. Nat. Bank of Omaha, 91 F.2d 214 (C.C.A. 8th Cir. 1937).

Wash.—Kietz v. Gold Point Mines, 5 Wash. 2d 224, 105 P.2d 71 (1940).

[FN3] U.S.—Doe v. Baxter Healthcare Corp., 380 F.3d 399 (8th Cir. 2004) (applying Iowa law).

[FN4] U.S.—Nance v. Maxwell Federal Credit Union (MAX), 186 F.3d 1338 (11th Cir. 1999).

D.C.—Urban Development Solutions, LLC v. District of Columbia, 992 A.2d 1255 (D.C. 2010).

[FN5] U.S.—In re Reilly, 262 B.R. 197 (Bankr. D. Conn. 2001).

Ariz.—Perry v. Apache Junction Elementary School Dist. No. 43 Bd. of Trustees, 20 Ariz. App. 561, 514 P.2d 514 (Div. 2 1973).

Iowa—Basic Chemicals, Inc. v. Benson, 251 N.W.2d 220 (Iowa 1977).

[FN6] La.—Aranyosi v. Delchamps, Inc., 739 So. 2d 911 (La. Ct. App. 1st Cir. 1999), writ denied, 750 So. 2d 187 (La. 1999).

[FN7] Ill.—John Deere Co. v. Metzler, 51 Ill. App. 2d 340, 201 N.E.2d 478 (4th Dist. 1964).

[FN8] S.C.—First Union Nat. Bank of South Carolina v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998).

[FN9] Md.—Cottman v. Department of Natural Resources, 44 Md. App. 224, 407 A.2d 802 (1979).

[FN10] Ga.—Griffeth v. Principal Mut. Life Ins. Co., 243 Ga. App. 618, 533 S.E.2d 126 (2000).

[FN11] U.S.—Scolnick v. Winston, 219 F. Supp. 836 (S.D. N.Y. 1963), judgment aff'd, 329 F.2d 716 (2d Cir. 1964).

CJS CONSPIRACY § 25

END OF DOCUMENT